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OR,

D I A L O G U E S

CONCERNING THE

LAW AND CONSTITUTION

OF

E N G L A N D.

WITH

AN ESSAY ON DIALOGUE.

BY EDWARD WYNNE, Esq.

LATE OF THE INNER TEMPLE.

THE THIRD EDITION.

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P R E F A C E.

IT matters little to the Public, who are now in possession of these papers, in what manner the Editor came by them : or why, after they have been kept in obscurity so long since the date of their composition, they come at length to see the light. It is incumbent, however, on the Editor, to say something of the nature of the undertaking which he has ventured to present to the Reader.

Lord Bacon has introduced one of his pieces into the world with an observation, “ that every man is a debtor to his Profession.” How much more is every man a debtor to his Country, which includes every blessing he enjoys ; and for the sake only of which any particular Profession is established ? The maxim then is just, as to the universality of the debt : the difficulty is as to the means of discharging it. Those who are eminently active in the service either of their Country or their Profession, doubtless go farthest in the application of the principle : But they are not altogether (it should seem) without their share of the Contribution, who endeavour to inculcate a reverence

to it in others ; and to describe the structure and excellence of the machine, of which it is the lot of far superior abilities to regulate the motions. The difference being much the same here, as Sallust has made between the historian and the person whose actions he celebrates : “ Pulchrum est benefacere Reipublicæ ; etiam bene dicere haud absurdum est.”

It is indeed the happiness of very few writers (like Lord Bacon) “ to strengthen the roots and “ foundation of the science itself ;” and in such a manner to discharge the debt, as to exchange the condition, and become creditors to all posterity. But the world is generally inclined to make allowance for the difficulty : and even, like a merciful creditor, to accept in many cases a composition instead of payment. It is in that view only the present performance can pretend to recommend itself.

The Author himself had many scruples about appearing in public : He used to think, that his subject was of that difficulty and importance, that it was more proper for a Special Jury, by which he would wish his work to be tried, than by the world at large, who are the Common Jury that set upon the reputation of an author in cases of publication. On the one hand, for the Professors of the Law to treat it merely as a Law Book, was more than he presumed

sumed to think it deserved; and what in reality was never thought of at the time of composing it: Besides, he doubted those who looked merely for Science would be disgusted with Imagination. On the other hand, he feared, those who in all their studies sacrifice either to the Muses or to the Graces, would little relish a dry subject, though attempted to be put into a palatable form.

The Author's scruples were to himself. This idea, however, of considering the Public as a Jury, is not a very extravagant one in the subject before us; and in that character the Editor, as a third person, for a moment places himself on the Bench, and addresses the Public at large with respect to the fate of the present work: and does from this instant lay aside any private regard for the Author, in assuming the impartiality of a Judge.

Gentlemen of the Jury,

This cause now before you for your determination is in the nature of a feigned Issue: I must observe to you, it is not a question of damages; for the author never sat about this work with a view to profit; nor is he in the least solicitous about the sale of it, in that light. It is, Gentlemen, a question of right merely; in which the Author is to be considered as the Plaintiff, and those Readers who hap-
pen

pen to dispute the present claim of the Author are the Defendants. And the only question between the parties for you to try, is whether the Plaintiff has a right to that reputation, which is the necessary consequence of some publications ; which liberal minds prize above every other advantage ; and which the present Plaintiff, in consequence of your verdict in his favour, would be sure to obtain.

Gentlemen, as the whole evidence necessary to decide the matter in question is before you, it is unnecessary for me to recapitulate it ; much less will I single out any parts of it, because your determination, I am persuaded, will be (as it ought to be) grounded not on this or that part, but on the whole taken together. I would rather wish, Gentlemen, to direct your attention to some points that arise from considering in the most general view, the importance of the subject and the manner of conducting it.

If you should be of opinion that the subject interests the Public ; that the form in which it is treated, is not only uncommon, but taken together with the subject is calculated for a few hours to supply the place of such books of amusement as have nothing but the form to recommend them ; if you think the notions the author has advanced are, upon the whole, supported by the many great names that you observe he has

called

called as his Witnesses on the present occasion ; if you find that he has dissented with candour where he differs in opinion ; if where he censures things, he has industriously spared persons, or where he thought himself obliged to censure passages he has fairly cited them ; if, upon the whole, you should be inclined to think rather favourably of his head, and at the same time you find no grounds for any imputation on his heart, you will give your verdict in his favour ; but if, upon the whole, you think otherwise, you will find for the Defendants,

One word I must add, Gentlemen, as to the consequence of your verdict, which ever way it may happen to be given : and that both as it will affect the present Plaintiff and the world at large. I am sure, Gentlemen of your experience know the case of authors in general is always in some measure involved in the question about any author in particular. That consideration on the one hand ought not to induce you in any case to judge contrary to evidence ; it is your business, in every case, to determine fairly on what is before you, “ blame where you must, be candid where you can.” In this conduct, Gentlemen, on the other hand is interested not only your own reputation as a Jury, but the very being of authors and the cause of literature.

The

The consequence of your determination to the present Plaintiff is of less importance, but what I must not pass over. This is one of those cases, where a verdict is conclusive: The Plaintiff can have no new Trial. If you determine against him (which it is very proper you should, if you think his Book dull and uninteresting) your verdict will have the effect of a perpetual Injunction: For without affecting the great question of the Liberty of the Press, I scruple not to assert, that if the Public do not receive a Book at first, the Author will scarce reprint it himself; and the Book-seller has too great a regard for your judgment to do it for him. But if you should incline in his favour, he will then be entitled to those several advantages that are consequential in such a case.

For your ease I must inform you, Gentlemen, this is not a case in which the Law requires you to be kept without meat and drink till you are agreed in your verdict; nor, indeed, are you expected (as in common cases) to be unanimous: your verdict, however, will certainly have greater weight, the greater the majority happens to be that concur in the same opinion.

Upon the whole, Gentlemen of the Jury, you will remember, though not upon your oaths, you are upon your honour: and I doubt not you will in this case, as you would in any case of property, give your verdict impartially according to the evidence before you.

AN
E S S A Y
ON
D I A L O G U E:

PARTICULARLY ON

The Application of that Form of Writing
to Matters of LAW;

BY WAY OF

I N T R O D U C T I O N

T O

The following D I A L O G U E S.

*Ut in vitâ, sic in studiis pulcherrimum et humanissimum existimo,
severitatem comitatemque miscere.*

PLIN. Ep. l. 8.

A N
E S S A Y
O N
D I A L O G U E.

I N T R O D U C T I O N.

AS I would wish to remove every objection to the following Dialogues that may well be foreseen; there is one that I must guard against at the outset, as it may possibly meet the reader at the very title-page, arising from a seeming impropriety of the present application of the form itself. It will be necessary, therefore, to consider this point with some attention.

The form of writing, called Dialogue, professedly imitates conversation, and has many advantages on particular subjects, that other forms have not. It enlivens the driest subjects; and gives an air of freedom to all: under the appearance of
common

common discourse, it may inculcate the most useful truths; and by the different characters of the piece, is admirably calculated to remove those prejudices and objections which few subjects are free from, especially to those who are little acquainted with them.

On this account it is, that some writers in all ages have chosen this form: of which it is sufficient at present to mention the beautiful remains of the Socratic school, in the writings of Plato and Xenophon; and the charming copies Tully has left us of them, at least equal, if not superior to the originals.

Intending to consider principally the most perfect form of Dialogue, I need take no notice of those allegorical sketches, left us by some of the Antients; wherein virtue and vice are described, under feigned characters, and a more imaginary existence. Such as the choice of Hercules in Xenophon, and the Table of Cebes, and some of the Dialogues of Lucian. To which I may add (as much of the same kind) the Masque so finely fancied by Lord Bacon*.

These are confessedly fictions of a much bolder cast, and want nothing of poetry but metre.

The perfect Dialogue, though it comes much nearer to real conversation, has, however, a race of fancy, that puts it much above the level of common prose; if it may not be looked on as a kind of poetry. In which notion, I may shelter myself under the authority of as exact† a judge

* See his Letters published 1762. † Aristot. Poet. c. 1. p. 2. Edit. Oxon. 1760.

of composition as the World ever knew: for Aristotle allows that metre will not of itself constitute poetry, though it may be essential to it. Indeed if it did, a real history by a new arrangement of words might be turned into a poem; or Homer and Virgil by mere transposition might be degraded to plain prose. Neither of which, those who have any idea of poetry, will bear to hear.

The invention * and fancy are alone of the proper essence of poetry: and any composition, whatever be its subject, or however it may be founded on real events, or contain moral truths, if it be as it were coloured over by fiction, approaches more or less to the nature of poetry. It is in this view, that real history may be made the basis of a good poem, provided the events are not minutely copied, and such events as are related, are interspersed with episodes, and connected by poetical machinery. Of which kind are Lucan's *Pharsalia*; and Shakespear's *Historical Plays*.

The form of dialogue, in the very nature of it, borrows the aid of fiction; the scene which it represents, and the characters of which it consists, are pure efforts of the imagination. But as its view is to instruct as well as to amuse, the reins

* Hence the very name of poet, who in the language of one of the first of them "*can give to airy nothing a local habitation and a name.*" And hence Lord Bacon, in the passage often cited, deduces the pleasure we feel in reading the sublimer poetry, vol. 1. p. 42. Aristotle, who derives this pleasure altogether from our natural love of imitation, is not however inconsistent with the other account. And though the cause assigned by him, is common to the other imitative arts, yet when their connection with poetry is considered, he will not be thought to have gone too far: for even Lord Bacon's reasoning concerning poetry, is in a great degree applicable to the other principal mimetic arts.

must not altogether be guided by fancy ; but some settled path is at least to be pursued. It must be in some measure of a *didactic* as well as of a *dramatic* nature: one of these must be all along made consistent with the other. It must be in dialogue, as in a professed didactic poem. To instruct, as well as to please, is indeed supposed to be the end and aim of all poetry ; but this end ought to be kept closer in view in didactic poetry than in any other. A poem written on this model, that fails of instruction, by not conveying useful precepts, ceases to be a didactic poem : and if these precepts are not conveyed in a pleasing manner, they had much better have been delivered in plain prose. A poet who has imagination enough for this manner of writing will find variety of ways to prevent the instruction, which he would wish to interweave, from being tedious. He will sometimes, for instance, throw events, or the ordinary occurrences of human life, into allegory ; at other times he will chiefly mark what he describes, by an intimation of its probable consequences ; or instead of formal comparisons will rather hint the resemblance in its moral application.

Fiction then in a didactic, as in other poems, will all along join with truth ; but with this difference, that as in other poems, it is chiefly required that fiction has the air of truth ; here truth itself wears the mask, and

“ Men must be taught as if you taught them not.”

It is just so in dialogue: the didactic nature of it consists in teaching something by feigned characters, and in an imaginary conversation: but the
dramatic

dramatic cast of the work must soften the rigour of professed instruction.

Real conversation is of all things whatever the most incapable of set rules. The few observations that have been left us on that subject by Tully, Bacon, Temple, and Swift, are rather hints to avoid faults in it, than means of improving it. In the various intercourse of mankind, so widely different in their temper, education and ways of life, what rules or restrictions can be necessary, but those which decency and common sense will sufficiently dictate?

Written conversation, however, has not the privilege of being so free and unconnected as that in life. Dialogue, indeed, is the most free of all kinds of writing, and in that too it resembles conversation; but it ought not to resemble it, in flying from one subject to another, without any kind of thought, view or connection. When the subject is once chosen, it must be pursued, in some settled plan; or the characters in it may as well have recourse to observations on news or weather, which are the usual topics of barren or exhausted conversation.

But the essential requisites of a perfect dialogue will be better understood, if the double nature of it is a little closer considered. When I speak of its *dramatic* nature, it must be owned, the term is rather improperly used in its general sense; because the accompaniments of the drama are concerned here rather than the action which more immediately belongs to it, and from whence it is denoted: but in considering Dialogue as a dramatic composition, I mean, it will require a scene and characters. The subject, whatever it is, is not to be entered
on

on nobody knows when, where or why: though the subject itself will go a great way in pointing out a proper scene, the different characters, and form of introduction. In laying the scene, some few Moderns perhaps have out-done their masters the Antients, who dwell very little on the scenery and introduction to their dialogues. Of Tully's, for instance, the introduction to the fifth book de Finibus, and that to the second de Legibus, are most remarkable. But landscape painting itself can scarce be more picturesque than the scenery of some modern dialogues: of which Addison's and Berkley's are remarkable instances.

The reason why the Moderns have been most solicitous in the scenery of their dialogues, may perhaps be drawn from considering that the whole of their design is invention. The Antients, who worked real characters into their pieces, were necessarily in some degree confined in the choice of their scenes on that account: and where they used * any, commonly fixed on such places for their dialogues, as the persons who composed the party were most likely to appear and converse in. And thus Plato's scenes, as well as Tully's, are strictly real, though he is supposed † to have embellished an Athenian shade with a plane tree or other ornament, that did not exist but in his

* In many of Plato's, no scene is laid in the opening; as in the Gorgias, Philebus, Meno, Hipparchus, &c. And the Timæus, one of his most sublime dialogues, begins with Socrates counting his companions, and missing one that was present the day before: the first words of the dialogue are "one, two, three; where, Timæus, is the fourth who was with us yesterday? &c. Edit. Serran. vol. iii. p. 17.

† Cic. de Orat. l. 1.

writings. The Moderns draw their scenes principally from fancy: and in so doing have the advantage of making them, by the aid of a warm imagination, more agreeable than any precise spot faithfully delineated; while at the same time an imaginary scene is best suited to artificial Characters. But whatever the Antients may be thought to want in the scenery of their dialogues, they abundantly make up for, in the occasion of them; the manner of connecting the introduction with the subject; and the plan of conducting them; to imitate which with success, seems to be all they have left for those who come after them to hope for.

In the *dramatic* part of dialogue, the choice and management of the Characters are principally to be attended to. They must throughout the piece be uniform and consistent: he who in the beginning of it wants information on the subject, or comes violently prejudiced against it, is not without apparent probability to close the conversation with a victory over his own ignorance or prejudice; much less to become the wisest of the whole company in what at first he was most a stranger to. This great rule, as to the consistency of character, is founded on a regard to probability; and is no other than the well known one of Horace, for the real drama.

But as the *didactic* nature of dialogue introduces the greatest limitations on the Characters, to avoid repetition, something must now be said on that head. All Dialogue proposes to inform in some measure upon some set subject; but the writer, who proposes to inform us this way, must above all, be cautious of doing it with ostentation. Writers in common form are too apt to affect an undue superiority over their readers; in this form

it would be intolerable: because such a conduct would be intolerable in real conversation, of which this mode of writing is a copy. Sir William Temple, speaking of human life, says, "the mind of man is like the sea, which is neither agreeable to the beholder, nor the voyager, in a calm or in a storm; but it is so to both when a little agitated by gentle gales."—In conversation too the fresh gale may be thought preferable to the dead calm: it will be flat and insipid if the reply is all along only the echo of the observation. The minds of men in this respect may be considered (as opticians do all the bodies that surround us) as so many radiating points; all capable of reflecting more or less light from themselves. To extend and apply this allusion to conversation, one would rather wish the ray of light that comes from the reason of one man to have its own proper refraction, as it passes thro' the medium of another's understanding; than to be like a ray falling on a polished surface, and reflected back again exactly as it falls. In conversation thus varied, the harmony will be like that in a concert of music, more agreeable for the variety of instruments; each of which will be distinguished by its peculiar tone and effect, and all united will contribute to the excellence of the whole.

Dialogue therefore, which is the copy of free conversation, must take care not to degenerate into dissertation. In the Characters employed, it must above all things shun the air of a Lecture. The Characters must in general be of a level in most respects; and though it is the province of one person to take the lead on the main subject, the rest are not to be mere cyphers: they are to make their observations, propose their objections; allow what they think is justly advanced; deny, what
is

is not. There is no occasion to add, the subject should have some importance in itself; because, who aims at teaching what nobody desires to know? The writer too ought to put his own real sentiments in the mouth of his principal person; the reader will then have his clue, and will not impute contradictory sentiments to the writer; since it will be his own fault if he does not distinguish the Characters, and the doctrine from the objection.

Having sketched out this essay, and a considerable part of the following dialogues, before the republication of a set of moral and political dialogues, I was alarmed on finding by a preface then first added, that in forming my thoughts I had differed so much from the ingenious author on this subject.

It must be agreed to be a point in itself of no imaginable consequence to the happiness of life, or the cause of letters, which of us is in the right in the notions advanced; and so far it does not deserve even the shadow of a controversy. And yet the respect I have for a writer so justly esteemed, requires me to look a little into the difference between us; and see whether I may trust what has been said in this essay, as a defence of my plan; or whether the essay and dialogues are not at once overturned by moulding them into a form, in his opinion, * “so essentially defective.”

The principal thing about which we differ, is the necessity he insists on of chusing *real* Characters for the speakers in a dialogue: that the choice of fictitious Characters “is contrary to the practice of the old writers; and (as he urges) to the infinite disadvantage of this mode of writing in every respect†.”

* Preface, p. 16.

† Ibid. p. 16.

As I will own I had no such thoughts while I was writing on the subject, my manner of treating it was on those large grounds I have already chalked out in this essay: in which I have rather considered the nature of this kind of writing in the abstract, as resembling conversation; than supposed any particular characters were necessary to maintain a conversation on a given subject. The disadvantage in general of introducing Characters known in history, arises from the difficulty of supporting them. The rule here is the same as in Horace—

Aut famam sequere, aut sibi convenientia fingi,
 Scriptor. Homereum si forte reponis Achillem;
 Impiger, Iracundus, inexorabilis, acer,
 Jura neget sibi nata, nihil non arroget armis.
 Sit Medea ferox invictaque, flebilis Ino,
 Perfidus Ixion, Io vaga, tristis Orestes.
 Si quid inexpertum scenæ committis, et audes
 Personam formare novam; servetur ad imum
 Qualis ab incepto processerit, et sibi constet*.

In copying a real character then, if the lines of the portrait do not convey a striking likeness, it will be little better than sign-post painting. It will be like the *individuum vagum* of the Logicians; and can no otherwise pass for Socrates, Mr. Locke, or Mr. Addison, than as they happen to resemble the rest of the species.

Besides, in some particular cases the propriety of the design itself, however well it may succeed in the management, may be more strictly canvassed; as will be evident from one of the learned writer's own instances, that of the *Minute Philoso-*

* De Art. Poet. v. 119.

pher ; where the contrary has been observed. And would it indeed have been right “ in one of the “ best and politest of our writers,” as that author is allowed to be * ; or rather would it have been doing justice to any dead or living character, to have delivered it down to all posterity, marked as an Atheist or Freethinker, by its *real* name ? The purpose of those dialogues was to refute such notions : the purpose was every way suitable to the character and abilities of the writer. But it was to be done by arguments levelled against the cause in general, not by branding with infamy any particular person. If the person was dead, what was advanced as his notion, might possibly have been a misrepresentation ; if he was then living, it might have been a libel : because, though the law will punish every open insult on Religion or Government, it does not authorise any private writer to take the correction into his hands ; much less will it suffer him to invert the rules of justice, and by a direct attack on a real character, to let the punishment precede the conviction of the crime.

But the case I have put indeed is a very particular one ; and though it does result from the doctrine in general, I am aware it is by no means to be made an objection to the excellent writer now before us, because he had before excluded certain subjects from the province of dialogue†. And therefore, whatever qualifications he has required in point of form, they must in that view be understood to take place only where the thing itself is supposed to exist.

Taking it however as to proper subjects, (as the following may be supposed at present) though there would have been no impropriety in these dialogues,

* Preface, p. 15.

† Preface, p. 9, 10.

to have brought some of our great Judges and Chancellors once more on the stage; I see no necessity for doing it, and a considerable disadvantage had it been done. It would doubtless have given the doctrine an air of authority, but then the subject itself would have been confined in one respect; the speakers could have borrowed nothing from the present times; and therefore the design would have fallen greatly short of what the subject obliged me to consider.

To this it may be asked me, upon my own grounds, if this form of writing is, as to invention, a species of poetry, why not obviate this inconvenience as the poets* themselves have done on the like occasion? why not speak of things known at this day only, as if they were known at the times of which you write?

But the answer to this question must be my vindication. The very allowance supposed must go upon an admission, that dialogue, after all, is still a fiction; and thence that liberty is assumed. And if it is a mere fiction, why all this solicitude of chusing real important characters, under so many difficulties and objections as to the manner of supporting them? Why even in assuming real persons is the model to be adopted by halves; the Character to be closely copied, and the known peculiar style of the speaker at the same time to be neglected,

* Homer and Virgil have frequently done it. Prior in his tale of Apelles and Protogenes has humourously obviated the objection to such anachronisms. He makes the painter of Rhodes have his hour of tea-drinking at six, and then prepares himself for the ghastly smile of a critic at such a striking absurdity.

Tea, says a critic big with laughter!
Was found some twenty ages after!

Authors,

neglected, or at least “infinitely restrained *?” The fiction is certainly more simple in the creation of a Character; and nothing is then left to the writer but to preserve its consistency. If this liberty is allowed in the more rigorous representation of human life, in the real drama, why not much more in this species of dramatic composition? I must all along however avail myself of a distinction between *fictitious* and *fabulous* persons; the one having never had any real, the other not being capable of even a probable existence in the mind. Tully’s * reason and example both conclude against the latter, but can scarce be urged to the same extent against the former.

And although even this “is not copying the “Antients †,” it is not the less laudable on that account: it at least gives the merit of invention which will more than balance the chance of a defective imitation. And the very names of those who have shone in this kind of dialogue, will incline me to think it is rather too much to say, “they have written beneath themselves only because they did not keep up to the antient standard ‡.” Nor have they by any means lost sight of the “way which good criticism recommends §?”

Authors, before they write, should read.

’Tis very true—but we’ll proceed.

Poets often carry this fiction a great way, as when real history is shadowed out in the form of a vision or a prophecy; and in treating of early times, the events of many centuries afterwards are anticipated. Of which kind every body knows the famous vision in the 6th book of Virgil, and that of Milton comprehending a great part of scripture history. Of the same kind too is the fine compliment Shakespear has paid to his own times in Archbishop Cranmer’s prophecy at the Princess Elizabeth’s christening.

* Preface, p. 44. de Senectute, c. I. cited preface, p. 21.

† Preface, p. 14. ‡ Preface, p. 16. § Ibid. p. 15.

(which

(which is nothing else but reason and common sense applied to particular subjects) though they have departed from the practice of antiquity. Under those great names I shall shelter myself, and leave the ingenious writer to make the most of a spot he has so lately recovered, after it had been in his opinion lost to the world for so many ages; and which like a slip of land regained from the sea, is the proper reward of the industry that restored it.

After this long, but on my part not immaterial digression, (the object of which, I must repeat, was my own vindication, and not in any degree the censure of the writer from whom I have differed) I return to the observations formerly drawn up; and come next to consider the subjects of Dialogue; which have been as various as of most other kinds of writing.

The Antients have chiefly confined this form of composition to moral subjects: the Moderns have enlarged the plan; they have, besides considering the great art of living well, touched likewise on several other arts that tend to refine the manners, and make life pass away agreeably. Without particularly mentioning the several dialogues of different kinds, I shall content myself with reminding the reader of the most considerable names among our own writers, that have entered this list; those of Lord Clarendon, Dryden, Lord Shaftesbury, Addison, Bishop Berkeley, Mr. Spence; and some excellent writers now living, Mr. Harris, and Dr. Hurd; to which I may add some of the dialogues of the dead, such, I mean, where the Characters and the subject are drawn from true history rather than mere fabulous antiquity.

There

There are not many subjects perhaps, that are excluded by their nature from being treated of in this manner. To say in general what are improper, we must again look back on the nature of dialogue, as "teaching by conversation." The manner of teaching therefore, and consequently the thing taught (which will often have a manner of its own) must be such, as is not repugnant to the genius and nature of conversation. Dialogue may (indeed it ought, to) imitate the better kind of conversation; and if possible elevate the subject by the choice and formation of the Characters. But the question here is about the propriety of the subject itself.

And every body will allow at first view, any subject to be improper for a dialogue, which it is impossible to form any knowledge of from bare conversation. A dialogue for instance upon the elements of geometry or arithmetic, would be such a flagrant absurdity, that no one who has imagination enough to chuse this way of writing, will have so little common sense as to pitch upon such subjects. There are indeed parts of science, closely connected with both geometry and arithmetic, that writers of character have nevertheless made the ground-work of dialogues. Of which Fontenelle's dialogues on the plurality of worlds, and Algarotti's on light and colours, are well known instances. But then these sciences being conversant about common appearances; such appearances as strike the senses and captivate the imagination, when enriched by description, may very well be selected from the mass of diagrams and demonstrations with which they are blended in a system; and thus a great part of these sciences may be worked into very pleasing dialogues, though the sciences themselves
can

can never be thoroughly understood on such easy terms. It is much the same in a didactic poem: Science can never be taught in a poem, because the air and formality of science must be dropped in a poem as much as in a dialogue. The latter indeed, as to the rule of probability, is more strict than the former; (and in that respect resembles the old rule of dramatic poetry) because it ought to have such a subject, and be so conducted, that it may not seem improbable to be communicated and understood in a single discourse: whereas a didactic poem is not confined at all in point of time.

Some subjects then are of so abstruse a nature as to be unfit for conversation pieces; others are of a nature too trifling for composition. But of this kind writers and readers must judge for themselves.

The subject of Law in general steers very happily between these two extremes. Its connection with morality; its being what every body in society must live under, and consequently know something of, will always make it an interesting and not a difficult subject for conversation. And this propriety which stands its ground in the eye of reason, has an additional support from very early example, The treatises of Plato and Tully of this name, are still extant to vindicate the assertion.

The Law of England in particular, so very liberal and diffusive in its nature, will scarce be disputed to afford many entertaining and instructive topics of discourse. One reason to recommend this way of writing upon such subjects, may be drawn from a circumstance to which law and dialogue have equally a relation, that of "argument,"

“ment,” by which I mean the exercise rather of a natural than artificial kind of logic.

It is no small excellence of conversation to make use of this: without this it must degenerate into dry narrative or bare matter of fact. Repartée is the life of dialogue; and this is a form of argument as much suited to the genius of conversation, as the Enthymeme is to the best pieces of eloquence; which for that reason was called by Aristotle the *oratorical demonstration*,* as containing a just form of reasoning, and easily reducible to the most perfect *syllogism*; but at the same time without its fetters or parade. What I have said in this light of repartée as the great ornament of discourse, can never be understood of a common, though improper use of it, both in life and writings; the practice of merely refining upon words, and torturing them into so many different senses in the most trifling attempts towards wit: this at best rather deserves censure than imitation; its very excellence (as Lord Bacon has observed*) often proceeds from shallowness, as the less deep a river is, the quicker light reflects from its surface. A wit of this kind, like an echo, will for ever have the last word, because he is unable to have the first.

———— nec reticere loquenti
Nec prior ipsa loqui didicit————

But the Repartée that is founded on sentiment is a closer kind of argument. Besides the instances of this kind to be met with in the most improved

* ἐστὶ δὲ ἀπόδειξις ῥητορικὴ ἐνθύμημα.

... τό δὲ ἐνθύμημα συλλογισμὸς τις.

Rhet. l. i. c. 2.

† Essay on Conversation.

conversation,

conversation, there are many scenes in some of our best comedies that shew it in great perfection.

It being admitted then, that real conversation, and consequently dialogue, the copy of it, is often argumentative, and with great propriety; it will be hardly questioned, whether Law is of that complexion. Some sciences are in their nature addicted to speculation and retirement; like some plants that flourish only in the shade. Horace would have us believe all writers are of this cast.

Scriptorum chorus omnis amat nemus, & fugit urbes.

But this Profession must be learned, as it must be practised, in a crowd, and among the "busy hum of men." It is (as the wise Scriblerus observed of logic) "a polemical art, that can no more be learned alone than fencing or cudgel playing." It has a more particular relation to logic than any other art; if it is not one continued practice of it. And it was no great satire (however meant as such) to call * the learned in it, "answerers by Profession."

Besides what has been advanced, drawn from the argumentative genius of law, to recommend dialogue on the present occasion; the easy manner in which many points are capable of being explained by deductions from plain obvious principles; the fondness with which it is observable any news of that kind is always entertained in real conversation; the practice of furnishing several humorous scenes in comedies † from this source; and above
all

* View of Lord B. Philosophy.

† As in Shakespear's *Henry the Fourth*, and the *Conscious Lovers*. Wycherley's *Plain Dealer* is so remarkable an instance of this, as to be faulty through the excess. One of the most striking characters in that piece, and a female one too, is so great an adept

all the public manner of distributing justice in this country; all taken together may justly suppose something of law to be so well understood as to be no improbable subject for dialogue.

In saying which I must be understood to vindicate the propriety of the subject in general, by no means to insinuate, that a dialogue on this (or indeed on any other) subject, will be equally level to all capacities. Those who are bred to the Profession, will unavoidably have some advantage; but the less technical the style of a dialogue is, the more proper and perfect it will be in that respect.

On the other hand, it is some degree of credit to the study of the law, that it is susceptible of so mild and engaging a form: it is an easy answer to those imputations our law is too often loaded with, of being at best a dry study; and in the opinion of many, a mere jargon of different languages.

I scarce know any thing that can more effectually wipe off this stain, than a view of the great variety of manner with which our best writers have treated on law; each in a manner agreeable to the subject, tho' each has set it in that light his own imagination directed.

To pass over those funds of knowledge so copiously diffused in reports, systems and abridgements; the best original writers (whom alone I shall regard at present) on the subject of law, may be classed in several sorts.

1. That of commentary on some text-law; of which sort are Lord Coke's Institutes, Fitzherbert's *Natura Brevium*, and the antient readings on statutes.

adept in law, that I fear the humour of the character, which is truly great, can hardly be thoroughly relished by any but lawyers; though it is but justice to add, that this character has in our days had the greatest advantage from the representation of it.

2. That

2. That of treatise, on the law in general, or on some particular subject; as that great standard of Littleton's, those treatises of Finch, Perkins, Lord Coke's on copy-holds, Lord Hale's history, and indeed most others.

3. That of expatiating "on maxims of law;" that is, unfolding those principles of law, that hold in so many cases as to obtain the place of axioms, or truths worthy to be assented to upon the bare proposing them. Lord Bacon seems to be the first and principal writer that has used this way; and it is in its turn a very valuable one.

4. The method of proposing queries, as those of Mr. Noy, and the book under this title, supposed to be Plowden's*. This method has its use as being the opinion of great men in points that have occurred to them in study or practice, and are not determined by any judicial authority.

5. The last method of writing law that occurs, is that of dialogue.

The preceding method of putting queries, and inserting resolutions immediately, if the objects of those queries were undetermined points, and consequently not settled law, (as I have considered them, and) as the term seems to import, might be considered as the first rude form of a Law-dialogue. Although, if there is any foundation for what has been said, in general a dialogue consisting merely of question and answer, is extremely imperfect. It is "didactic," just as other treatises are, but has nothing "dramatic" in it; no diversity, and at the same time constant peculiarity of Character, which are of the essence of perfect dialogue: the parts in it are no other way distinguishable than by the mere initial letters, or the bare question and

* Athen. Oxon. Vol. i. p. 176.

answer. And yet of the few specimens the law can boast of this kind of composition, this imperfection is but too visible.

The most antient piece of this form, is the dialogue de Scaccario, of which there is a transcript† both in the Red and Black Book. The next in order of time, is that of Lord Chancellor Fortescue's de Laudibus Legum Angliæ, written at Berry, in Hen. VI. time: that of St. Germain's, called Doctor and Student, written before 1460, in the reign of the same king. A dialogue on Juries, supposed to be Sir J. Hawle's, written in K. Will. time, little more in form than question and answer; and the best part of it in substance, little more than an abstract of the resolution in a famous Law Case.

Sir Thomas More's two books of the best State of a Republic and of Utopia, are scarce to be classed among this species of writing. Admirable as they are for the purity of the style, and the vein of fancy that runs through them; they are certainly not properly dialogues: at least they are of a very anomalous form. It is true, they have a Scene and Characters; but those Characters are very faintly drawn: they seem a relation in company rather than a conversation; being chiefly a continued narrative, without much interruption from the audience.

Of the other dialogues mentioned, there are but two that have done any justice to this form; those of Fortescue and St. Germain.

The latter, the author of the set of dialogues called the Doctor and Student, is happy enough in the choice of his Characters, and the assignment of the part that each is to sustain. A dialogue be-

† See the Dialogue in Mad. Hist. Exch.

tween one who had no acquaintance with law, and one who was to teach it, would have soon disgusted a reader of skill and judgment: and none but a person of skill and judgment could have relished it, if the characters were so exactly balanced as to have equal knowledge of the subject. He has more happily blended his light and shade. A student of the laws of England undertakes to explain to a doctor of divinity, the general principles of the English law, as well as several critical points therein; the Divine, skilled in sacred, as well as natural law, is desirous of being instructed in the municipal laws of his country: the Student, qualified to give this instruction, is ready to receive it in other points which lay more within the province of the divine. This art of the writer, in laying out his Characters, gives him an opportunity of shewing in many instances, the union between law and conscience; and of reconciling them in many cases, where they seem to be opposite.

But Fortescue's dialogue of the two is more regular and dramatic: and ('till the agreeable writer above considered shone out in this path) is perhaps a singular instance of *real* characters being introduced into English Dialogue. His Characters are of the highest order, and the discourse sufficiently suited to his Characters. He has put the principal prejudices against the law of England, in the mouth of the Prince: and answered them in his own great Character, so fully, that the Prince owns his mistaken notions; and becomes an entire convert. By this conduct the noble writer has avoided a slavish panegyric of the law on one side, and on the other hand has not left the reader in doubt of the true opinion; for which some of the Antients have been justly censured.

The

The great outlines of this performance seem to be a preference of the Common Law of England to the Roman Civil Law, on a fair comparison of some principal doctrines. And in this respect Fortescue deserves much commendation himself, as he was combating a very unconstitutional attempt of the then reigning favourite to bring in the civil law. There are several lighter traits of value to the Profession, as to some points, where time has made this writer an Antiquarian, as well as where he explains the grounds of some of our modern practice. But I must add, that in general he has observed that strict propriety, as hardly ever to launch into his subject beyond the comprehension of one not bred to the Profession.

Having entered at large into the nature of dialogue, the subjects it admits of, and shewed that law, particularly the law of England, is no improper subject for this form of writing; and having made some remarks upon the few compositions that are to be met with on this subject, I am now come to the most disagreeable part of my work, to say something of the following dialogues.

The last dialogue on the English Constitution, is, on account of its subject, to be considered as the principal of the three. The Constitution being founded on law, and intimately connected with it, it was impossible to be silent on that head. The two first dialogues are therefore employed chiefly on that topic. The first to give a more elevated idea of our law, than, I believe, is commonly entertained; though I confess a much fainter than it deserves. The second dialogue is taken up in answering some plausible objections to several branches of it; such as are still echoed from one person to another, without the least candour or attempt to enquire the truth. I hardly need inti-

mate a restriction to the readers judgment, that do not hold myself to be answerable for all that is advanced in these dialogues, when I declare that my own sentiments are put into the mouth of Eunosus, and the popular prejudices against either the law or the constitution in those of the other speakers.

The subject of the last dialogue, though of such general concern, till of late has of all others been the least touched on. At one or two periods of time large volumes were written about the origin and nature of civil government; (which, however, has been miserably distorted in its turn) and we meet with some fanciful excursions about ideal commonwealths, and perfect models of government: the writers all the while not knowing, or disregarding, that degree of perfection that existed in their own: possibly as much as a real government will ever admit of, when the administration of it is in exact conformity to the principles on which it is established.

It does not fall within the business of the historian or lawyer, as such (confined to their own subjects) to give a just and full portrait of the Constitution: it must be performed however, from the united result of law and history.

And this, perhaps, is one reason why for so long a time nothing like a just draught has been given us. Fortescue's dialogue abovementioned, is so closely confined to the very letter of its title, "the Laws of England," that it says scarce any thing of its Government.

One book does indeed give the most ample view of both, that are to be met with in any one ancient treatise: and yet the book itself, though formerly quoted on great occasions, seems at present so little known, that it will be necessary to explain
myself

myself by saying it is Sir Thomas Smith's Republic of England, that I am now speaking of. Perhaps it may not be amiss to give some little account of the author as well as of the performance.

And here I must promise, that the fairest way of considering any antient writer of law, is not to view his performance altogether with the eyes of the present age as the law now stands; for our best writers, removed an age or two back, nay, even laws themselves, will not stand that test. Above half of Littleton's famous book is obsolete; and a great part even of Magna Charta is become a dead letter. Nor yet is it fair to compare them with those, who have written long since; and are now esteemed the best writers on the subject. The only proper way is to consider them as to the time in which they lived. And in this light, if Sir Thomas Smith's work is of little regard, compared with what may be picked out of the writings of Lord Coke or Lord Bacon; we must remember, when Sir Thomas Smith wrote * Lord Coke was scarce called to the bar, and Lord Bacon was but four years old.

But if his having lived first was his greatest merit, it would be very little indeed. He has touched on many points not within the common subjects of Lawyers; and has, on many occasions, explained himself more to the general apprehension, than those who adhere too much to technical language.

He

* Ann. 1565. p. 272. Rep.

* Sir Thomas Smith travelled when young at Hen. VIII. expense; afterwards had the Professorships of the Greek Tongue and Civil Law in the University of Cambridge; was Secretary of State to Ed. VI. and in high employments at home and abroad (during one of which he tells us this book was written, p. 273) under Q. Eliz. See Wood's Athen. Oxon. vol. I. 302. Digge's Ambassador contains several letters and instructions to him. And there are, it seems, still extant in MS. in the Harleian Collection, some

He was qualified by education and experience to do justice to his subject. He* was a very learned man, long a member of the university, and a great courtier; and had served his country both at home and abroad in several important stations. And when with all these advantages, he had opportunities of seeing the policy of foreign countries, he had the honesty, from a just comparison, to prefer the Constitution of his own.

He has with the same advantages answered many of those little cavils against the law of England, which those who live under it, unmindful all the while of its blessings, and ignorant of the severity of other laws, are ever so fond of raising. And though bred to the civil law, he seems to have acquired an intimate knowledge of the common law; and its valuable peculiarities †.

But this book, precious as it is, on account of its early production, and its intrinsic merit, does not go so far into the subject as one could wish.

To come to the present dialogue, there are, I think, other considerations than the silence of any antient author, that at this time would recommend a more minute description of the Constitution: I mean the growth of the Constitution itself.

For though in the most early ages that history carries us back to, its freedom appears to have been of its very essence; and though, like the seed of a plant, or an infant just born, it was at its first existence perfect in its nature, as to the formation of its essential parts; yet time only could dilate those parts to their proper size and compass:

political discourses and letters of his. See Catalogue, 660, art 35. 260, art. 100, &c.

† See B. 1. c. 37. B. 2. c. 3. c. 8. c. 12. &c.

time

time only can bring government to its full strength and maturity, as it does a plant or an animal. Nothing in its infancy can exert those powers that are the end of its creation.

And what a pleasure it is to a cultivated mind, in the study of politics or of nature, to trace things in their progress; to contemplate the accidents they have escaped; the helps they have received; and the means by which they have imperceptibly arrived to their present growth?

This view, one might imagine, would be remarkably pleasing and instructive as to our own government, pursued through its several periods.—To see it, after so many shocks, advancing each century still nearer to perfection, by the concurrence of a thousand events which time alone could disclose. To see it, at length, arrived to that just equality in the distribution and exercise of power, that for so many ages it was an entire stranger to; that at present other nations can only envy; and that we, who enjoy it, can only wish may be fixed and permanent.

All this would recommend the design of that dialogue, if the execution could but in any degree be answerable to the design.

Since a great part of these dialogues were written, some ingenious works have been communicated to the public, that have served to make us better acquainted with this important subject, than we could be from any thing extant before; the writers of which have either collected many materials into a narrow point of view, the better to enable us to form our judgment; or have by their own skill drawn exact outlines, though they may not have finished the piece. I must beg leave to point out some only of the particulars I allude to, and that too more by way of explaining my meaning, than in the least to suppose, what I do or do not

not mention are not sufficiently known of themselves.

The first of these in order of time, and the second in no respect, was an *Affize Sermon preached at Durham*, and printed in 1764; and which, in the compass of two or three pages, contains, though in miniature, a masterly sketch of the Constitution. But I am almost precluded from saying, even this with any propriety of the performance itself, as I am well aware the very name in the title page is an ample certificate for its character in the learned world.

In this review I cannot pass over unnoticed, the tracts that have been published concerning *Spiritual and Temporal Liberty*: when I say of them (what most likely will be allowed by every body that has looked into them) that they contain a great deal of learning, extensive observation, uncommon candour and good sense; I must venture, as to the tracts on *Temporal Liberty*, (with which alone I am concerned) to differ from the Editor in thinking they were left finished for the press; as I am apt to imagine some passages would have been corrected on more mature reflection. It is not improbable that many of the quotations, which take up more than their share of room, would have given way to reasoning upon them; and the whole have been digested in a different order from that in which they now appear. But as it is, the subjects of the tracts are well chosen, and the book is a valuable legacy to the public.

The next thing of the kind I shall mention, is a book as extraordinary in its form, as it is instructive in its contents; and which in a comment on a single writ, conveys a great deal of knowledge of the Constitution. *Sir Bulstrode Whitlocke's Comment on the King's Writ for choosing Members of Parliament,*

liament, has all the profusion of his master Coke, with much more method. And though not a single word escapes him, yet his comment will scarce be censured as tedious or prolix. It is pleasant to remark the different effect, in this respect, such a comment must have on a reader, from what we observe in some of the most famous on Virgil or Horace. Here, from a dry confined text, the mind is conducted to the deepest recesses of law and antiquity: in the other, while it is enraptured in contemplating the most agreeable scenes that the genius and fancy of the author can paint to the imagination; his commentator would abruptly force us to turn aside, and enjoy with him an elaborate dissertation on a point or a particle. And if the Muse, like another Sybil, did not rescue us from their importunity, we might say of such commentators,

. . . Omne datum traherent per talia tempus,
Ni comes admonuit breviterque adfata Sybilla est,
Nox ruit

Such a one, where his power prevails, has the art of making the finest descriptions vanish from the mind, and leave only a word behind: our commentator, on the other hand, makes a bare word introduce us to the knowledge of the most important things.

In the preceding instance, the attention is as it were surprized into knowledge. In the next work that remains to be spoken of, tho' at the first page great expectations may be raised from the design and credit of the writer, they must be more than answered in going through the book. For, if in a course of academical lectures, the justest view is given of the Laws, with their history, and of the
Constitution

Constitution of this Country; I do not know a more emphatical application of the Grecian sage's wish, "to teach young persons in the early part of life, what they may use when they are men," than is given by the *Commentaries* on the Laws of England. If any body can have an objection to this work, it must be myself; for I find myself partly in the condition of Dr. Middleton, who was told "his book had been answered twenty years before it was published." Mine has laid by till it ceases, in a great measure, to be what it was intended to have been. The third dialogue, as to some material parts of it, has been anticipated by the performance now under consideration, and in such a way as to leave me much in doubt, whether my manner of saying things will atone for the want of novelty in many places. That dialogue, which at the time of writing it, I considered "as the principal of the three," is now become of less consequence; and must depend a good deal on its form. The other two I may still look upon as more strictly my own, both in matter and form; but I confess this with a great mixture of diffidence and partiality. Though the latter will not suffer me totally to destroy these dialogues, the result of so many hours amusement, yet the former at the same time tells me how much I must be indebted to the Reader's candour for letting them pass without censure or disregard. When I compare the subject of them with the execution, the least I can do is to adopt the modest way in which the Grecian Artists owned their celebrated pieces of sculpture, who expressed themselves in a mode of language *implying imperfection*, intending thereby to shew they were about such a Statue, rather than that they had in any degree finished it. How much more does it become me, though I should allow that at such a time "I
" was

“ was writing,” to disclaim all pretensions “ of
“ having written, Dialogues on the Constitution ?”

Upon the whole, I am far from pretending that this form of writing is the best way of being acquainted with the subjects contained in these dialogues ; much less, that the present are the most pleasing subjects for this form of writing. It is sufficient for me, if what these dialogues contain has weight enough to send any of my readers, who before were strangers to the subject, to those great authorities, the fountain head, from whence such learning flows the purest ; and that this mild and engaging form is not improper for the subject itself.

I shall then, with the vanity of an author, compare myself to one who in his travels over a bleak and dreary country, has picked up some plants, which he afterwards transfers to some delightful spot, in a milder climate ; where their novelty at least may make them admired even among more agreeable productions, by those who would never have visited them on their native soil. And if after all they should have any medicinal virtues useful in life, they will be welcome wherever they can be made to grow.

April, 1767.

EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

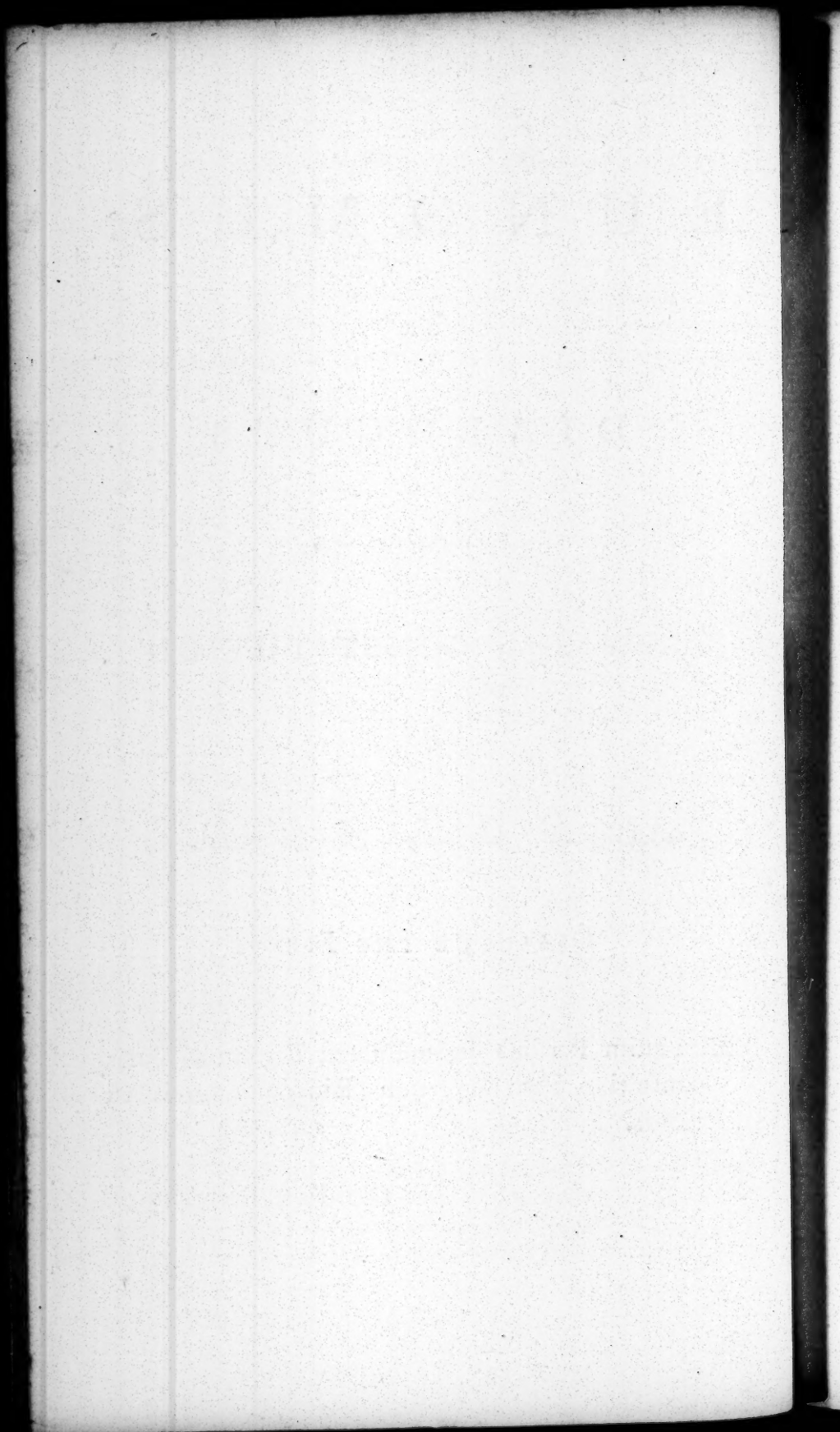
OF

ENGLAND.

DIALOGUE THE FIRST.

Mira enim Persona induci potest Britannici Juris
consulti. Hæc Ego non Rideo, quamvis tu
rideas.

CIC. FAM. EP. 7. 13.



EUNOMUS.

DIALOGUE I.

§. 1. **IT** was one of those agreeable mornings in the spring, when the sun cheers the whole face of nature ; the blooming state of plants, the fresh verdure of the earth, the soft air, and music of the birds, naturally tended to transfer a serenity to the minds of all that admired them. Induced by these charms, Policrites set out on a visit to his friend Eunomus, who was situated in a pleasant village, at a few miles distance in the neighbourhood.

Upon his arrival, he was introduced into the study, where Eunomus generally retired after breakfast to consecrate the most valuable hours in the day, to the improvement of himself. The study itself, by its situation as well as its furniture, was well contrived to answer this purpose. It was built on an elegant model, in a garden, at some distance from the house ; from which it was shaded by a tuft of trees, and was open to the river, and a fine prospect arising gradually from the bank on the opposite side. These advantages, besides affording Eunomus a retreat fit for contemplation, gave him likewise a most agreeable relief from the fatigue of it. A person of his education and enlarged notions, could never want the means of converting

verting such opportunities into an elegant amusement ; and making art contribute to set off nature. He had in the course of his studies acquired a taste for natural philosophy, and was provided with many of those instruments it furnishes ; and which under its directions procure so many beautiful images to extend our reason and enrich the imagination. Eunomus, indeed, being bred to severer studies could use employments of this kind only in the intervals allowed him by his Profession ; but he never was of opinion, that the study of his Profession was inconsistent with these or any other pursuits held in subordination to that, but rather seemed to think, that a man was capable of being a better lawyer by being in some degree a philosopher or a divine. For without a habit of reasoning from general principles, he used to think the mind would be ill qualified to judge in particular cases : and the idea of obedience to laws would often be very imperfect without recurring at times to a purer source of obligation and stronger motives than any that laws themselves can furnish.

After the usual compliments passed on both sides, the two friends entered upon various topics of conversation. Policrites casting his eye upon the table, among other books, saw the *Odyssy* of Homer opened in that part, where the discovery of Ulysses to his aged father is so pathetically described.

The affecting strokes of that page, says he to Eunomus, which I observe has lately engaged your attention, remind me of the loss I shall sustain, by being now obliged to quit those enchanting scenes of fancy for the dry and intricate paths of law. I wish the poets had less power of captivating the imagination, or that their power was attended with less fatal consequences to the deeper parts of learning

ing. The soil of Parnassus, I am sure is barren, however pleasant the air of it is. But why should I blame the poets in particular, when other arts tending only to polish and refine the manners are subject to the same imputation? Those who are addicted to this Profession, ought to give them all up; or at least must allow, that by retaining their fondness for these, they retard their progress in that. They occasion the loss of much time, and at best are things, with which the study of the law has no manner of connection.

EUNOMUS.

§. 2. I admire your honesty (replied Eunomus) rather more than your zeal: your former passion for the liberal arts I perceive has not restrained you from thinking freely of their real value; nor has the fondness, which you observe I still retain for them, hindered you from delivering your thoughts on that subject with the same freedom to me. It must be confessed you speak the sense of a large party, who have ever looked upon the black letter in the old Reports and Statute Books as a kind of spell on the understanding: or, in a more familiar phrase, as if lawyers had entered into a recognizance to talk and think of nothing but law; and that on pain of forfeiting all skill in the Profession. I am glad, however, that you have taken the cause into your own hands. You will labour more in its defence, and not rely on numbers of your side instead of arguments: or, as too many advocates would do, oppose the weight of a multitude of bad precedents to the clear dictates of common sense.

I am persuaded (for my own part) that all arts and sciences have some kind of connection with
one

one another ; and that “Law,” as one of these, is not, as you seem to represent it, like one left on a desert island, and shut out from all society : but that there is a mutual intercourse constantly kept up between the law and other sciences ; the first by protecting the latter, and the latter by the various lights and illustrations they afford in the study of the law.

POLICRITES.

§. 3. Your conclusion is obvious ; and it will be little to my honour, if I do not stop it in its career, by weakening the premises from whence it is deduced. Before I enquire into this connection as a fact, I wish you would explain what you mean by so vague a term. And in the course of your argument, I shall expect you to shew, not only that in the reason and nature of things this connection between the arts and sciences subsists ; but that there have been some, so far advocates for the reason of things, that they have made themselves illustrious examples of this union : and not turned all the rest of the arts and sciences out of doors in favour of one, either thro’ partiality, or for want of room in the understanding to receive them.

E U N O M U S.

I should not be unwilling to undertake this task so much upon any apprehensions of defect of proof, as of too great a demand on your patience in attending to so copious a subject : especially to my inartificial manner of treating it ; which, however, you may partly thank yourself for, by attacking me so suddenly, and totally unprepared for an exact defence.

§. 4. Your

§. 4. Your calling upon me at the outset for the definition of a term, that both in itself, and in this application of it, must needs be so well understood, looks as if you was not very confident of success in the merits of your cause; and so intended to take advantage of every little slip in point of form. Your once admired Tully at least supposed what was meant by this connection to be known; and he supposed (more than you will allow me at present) that it did subsist: otherwise it would have been an useless topic in defence of his Archias. You remember what Pope as a poet said to Jarvis as a painter; and the illustration they mutually gave to each other's studies, "by art reflecting images to art." And certainly the imitative arts, not only as having often the same objects in view, but as being alike dependent on the imagination, must necessarily be capable of assisting each other. The very rules of judging of the works of different arts are often the same; and from their resemblance it is that forms of expression, properly belonging to one, are applied in treating of another. In short, this resemblance is in a great measure the ground of metaphorical language. To this we may add, that arts themselves often invade each others province; the one imitating what without examples, one would imagine to be the peculiar objects of the other. In proof of what is here advanced, how can we else account for those constant comparisons with sculpture, painting and music, to be met with in Aristotle, Tully, Horace, Longinus and Plutarch, while they are treating of the works of orators and poets? Has not Addison in his travels abundantly proved, that the statues and marbles he met with, are best illustrated by descriptions of poets? And, that in points of antiquity, the remains of antient artists are inexplicable

E

cable

cable without comparifon, is evident from a thoufand inftances: before I will permit you to decide againft me, you fhall at leaft read over Addifon's Treatife on Medals; and the Polymetis, written on a larger plan: and though I was not to prove the immediate connection between any two particular arts, yet I hope you will allow me to infer a connection between the extremes, if I can prove to your fatisfaction fome intermediate art is equally ufeful to any two feemingly difjointed and independent. To prove them in any degree auxiliary to the principal, will I think be abundantly fufficient to recommend them.

POLICRITES.

§. 5. I fit liftening with fome uneafinefs for fear of turning fceptic: your argument feems, to take in the whole circle of fciences; all are neceffary at this rate to be attained; and if I cannot mafter them all, I fhall be allowed to underftand none; I expect prefently to be told I can be no lawyer without knowing that the angles of a triangle are equal to two right ones; or that the property of a field cannot be difputed in Weftminfter-Hall, but by thofe who know how to meafure it. Merchants, upon more than one occafion, have told us that lawyers are improper judges of mercantile controverfies; and the fame incompetence has, you know, been infifted on in favour of ecclefiastical jurifdiction, and in exclusion of the common law.

EUNOMUS.

§. 6. Not to mention that your objections have anticipated my argument, and therefore I fhall take

take no particular notice of them, now; they all go upon a grand mistake—by supposing that a lawyer, to judge in any case that comes before him, must be an adept in the several arts of his clients; and that he cannot determine the right in question, without he understands the practice of the trades or employments from whence it arises. But I may even refute you in your own instances; by desiring you to recollect a passage in Xenophon, where Socrates recommends Geometry and Arithmetic as a part of general education, but is far from approving of his scholar's exploring the mysteries of either of those sciences. Or to put you in mind of a later authority—but I desire no authority may extend beyond the reason of the thing; for I mean to obtrude no notions under the sanction of a great name: but still in justice to the authors, when I borrow the argument, I ought to tell you from whence; and I remember the time when an opinion of Socrates or Locke, though it had nothing new in it, would weigh more with you, than if it had been a truth silently acquiesced in by all mankind.

§. 7. Mr. Locke would scarcely have mentioned geometry in a treatise of education, unless, in his opinion, some acquaintance with it, was of general utility. What that utility is, he has hinted more than once in a more perfect work, and on a more weighty occasion. No less than the powers of the mind are interested in the researches into Geometry and Algebra: and I think he has very forcibly explained himself on this head, by saying, that he recommends these “not so much to make
“ men Mathematicians as reasonable creatures.”

POLICRITES.

I know not then whether Mr. Locke would not have had above half the Earth converted into a madhouse: for at his rate of thinking, one sex, I believe, must be void of reason, and many of the other could rarely make pretensions to it, by producing a certificate of their having solved a problem in Algebra. I must own he would have made a very loyal subject in Swift's kingdom of Laputa.

EUNOMUS.

Your raillery is but ill pointed at Mr. Locke; and the honours you would confer on him in that respect seem but very little deserved. His skill in these sciences was far (I believe) from that of an adept; and indeed much less than he proposes, will answer the purpose for which alone he recommends them. For the attention to be acquired by these studies; the perspicuity and just form of reasoning for which they are so deservedly commended; and which they will imperceptibly communicate to every one that is at all conversant with them, may (I will venture to say) be learned as well from the first book of Euclid as from the six first. But when I allow with Mr. Locke, and the author of the Analyst, that Geometry is an excellent logic, I would by no means exclude logic properly so called: nor would I attempt to insinuate, that a figure in the literary world might not sometimes be made without the knowledge of either. They are both confessedly, when well regulated, excellent means of forming the understanding, and directing it in the search of truth; but they are not the necessary, nor the only means. Nature and habit without rules are often sufficient to attain this

this end : but who will pronounce any rules useless, because some by peculiar happiness are able to do without them ?

POLICRITES.

I find I may without prejudice grant to you, that there is some connection between the arts : but this concession will only increase my doubts, and your difficulty in satisfying them, about the possibility of the attainment. You look as if you would have every scholar invested with all the arts and sciences, and compleat in himself, like the philosopher in Tully, who had no part of his dress but what was of his own making. Besides, the principal part of your undertaking is still in arrears ; to shew what a lawyer has to do with them : and for that reason I was willing to spare you some trouble in examining every article of your account ; but I expect you should make me amends on this head ; otherwise I shall persist in my intention, and leave you to enjoy your Greeks and Romans by yourself. And at present, I shall rank in the same number, as foreign to our profession, the study of antiquities, classical learning, and all your admired arts ; which, however connected with one another, have little or nothing to do with the study of the law.—But I still lay open to a rational conviction, if you have courage to undertake it.

EUNOMUS,

I hope in general to give you some satisfaction, and to send you away better pleased with your own profession than you came here ; for it must be rather difficult to give up what you seem to have once so much admired. Besides attempting

ing to prove even this connection in the abstract, as I in some measure did the other, there are many topics (I flatter myself) that can be more forcibly applied here than in the other case. No doubt you will laugh at me, if I should think of "giving acts of parliament in evidence on this issue:" or refer you to your own report books in support of part of my argument. I shall even go so far as to produce you some illustrious examples (as you called them) of this union; and part of my scheme will be executed by reminding you of some books, which those of your own Profession have obliged the world with; and which bespeak an acquaintance with some of those arts you now dispute the use of.

§. 8. When you called upon me to produce instances in our Profession of those who had in themselves connected law with other sciences, you did it (I imagine) rather with an air of opposition than of real doubt; and as if you would triumph, without a victory. Can I suppose you are unacquainted with the undoubted evidence, many of the greatest lawyers have left in works of this kind? Must I remind you, for instance, how Hale explored the depths of divinity, mathematics, and history? How the history of Utopia holds up in the mirror of fancy, the picture of a well-policed state, its arts, its laws, and government? Or am I to repeat to you a catalogue of Lord Bacon's writings, before you will hear of him in this respect as "the wisest, brightest of mankind*?"

But I think I may conclude, that we have had some who have perfectly understood many of these arts, though they have not left or ever written a single treatise upon any of them. I will conclude

* Ethic Epist. 4th.

this—either if it is attested by credible witnesses; as Addison and Swift both allow of Lord Somer's, for instance,—or if in their writings on other subjects, or their public elocution, such a vein of imagination runs through their arguments, such a spirit in their images, that they could no more express themselves in such a manner without having a natural turn for the liberal arts, and having been much conversant with them, than you can suppose a representation in a mirror without the presence of the object it resembles; or a parody on Homer or Virgil made by a person who has never read the passage to which it alludes. But for evidence of this kind, you must read the characters of historians; though in this respect recent tradition is often perhaps a more faithful register than history. After what I have offered, and what you may collect on this head, I do not know whether it will be too much to say (as Finch has said) “that the sparks of all sciences in the world are raked up in the ashes of the law.”

POLICRITES.

Oh no; it is rather saying too little than too much, every thing considered. Finch himself, indeed, is a little too narrow in his premises, though he makes up for it in his conclusion. If I remember right, he rests the connection of the law chiefly with the arts of logic, grammar, and other dry speculative systems. But the more ordinary and familiar occurrences of life, are not without contributing their quota of legal knowledge. Thus, for instance, the sage Littleton deduceth the very name and nature of bringing estates into hotch-potch from a “pudding,” and gravely informeth us of the reason of the name, because (saith he)

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“ in a pudding is not commonly put one thing alone, but one thing with other things together.” And nobody, unacquainted with our good old writers, master Bracton and master Briton, would imagine that so common an object as a bowl rolling down a hill, might lead us to a true theory of descents of inheritances : for the singular circumstance in our law, of estates never ascending to the father, is accounted for by them from the law of gravitation. And then how much must we be interested in the study of natural history, to trace that exact similitude, Lord Coke tells us (from the parliament rolls) is subsisting between an elephant and a member of parliament. Happy for our good country in this respect, that the law has established it as a maxim “ that no simile goes upon all fours.”

Just about this part of the conversation, a pleasure boat was going along the river, and the music was playing ; which echoing from the rising hills, and softened in its progress over the surface of the water, agreeably surprised the two friends, and for a few moments interrupted their discourse.

But Eunomus taking advantage of the incident that occasioned the intermission, asked his friend, whether he thought music an enemy to law ?

POLICRITES.

§. 9. Its not being an enemy only, will not answer your purpose ; the question is, “ what connection has it with law ?”

EUNOMUS.

The same connection, I should think, that good spirits and a calm unruffled temper have. And though it is not every body that loves music ; or
if

■ they did, would it be worth while on all occasions to send for a musical instrument to recruit the exhausted spirits, or restore the tone of mind when weakened by an intense application; yet I question whether the effects of music, (so common and improved as it has been within this last century) are not still so great as to make the accounts of the Antients less fabulous than they may seem at first notice. I will maintain, that you will still find as much use of your instrument as you did before.

POLICRITES.

Whether I shall have time to use it as much as I did before, I cannot tell; but you may save yourself any farther trouble on that point, and proceed in your journey, for you have a great way yet to go.

EUNOMUS.

Well; but in the last article you have granted me a little more than you think for. When Handel (whom for his comprehensive genius I would venture to call the Homer of music) and those other excellent chiefs of the musical tribe, have such pretensions to your esteem; has not Homer and every other favourite of the muse a much greater claim to it? The amusement from one source is not transient, as that from the other: it refreshes and it improves; it is retained in the memory, refines the imagination, and augments the treasure and powers of the understanding. The former compared to this, is like the smell of a flower, which however pleasing, is a short gratification of the senses only: whereas this, like the delicacies that strike the palate, when digested, becomes the fund and matter of nutrition.

§. 10. But

§. 10. But in barely mentioning the name of Homer, I am put on recollecting a material advantage, that father of poetry, as well as many of his descendants, will afford to lawyers:—those I mean, who either trace the great fountains of justice up to their head; or pursue the rivulets derived from thence in the innumerable channels of political institutions. Homer alone is a master in both respects. As to natural notions of right and wrong, and some of the most elevated sentiments of morality, the fabled waters of Helicon were scarce purer than his writings. And those who are at all conversant in Grecian antiquities, know that many of the antient laws of Greece are preserved in both his poems. Could it indeed be imagined, when something in almost every art may be learned from Homer, that the great arts of government and legislation alone were unnoticed?

I might on this occasion remind you of Terence, who besides the utmost chastity of style and lively portraiture of manners, for which he is so famous, has, in copying Menander, preserved many fragments of Athenian law. But instead of running over passages, or even the names of Roman poets, who have materials of this kind, I will appeal to the many eminent writers of natural and civil law for this century past, for the contributions they have levied on the poets and orators even for the materials of their subject; exclusive of the refreshment they afford; and which Tully insists is so necessary to a mind fatigued with the wrangling and jargon of courts. In short, it would be no difficult matter to furnish out a poetical code; which need not, however, exceed the Corpus Juris, or our own Viner's Abridgment,

POLICRITES.

POLICRITES.

I must own I have as yet fondness enough for the poets, to prefer a quotation out of Homer or Euripides by way of amusement to a string of cases out of the Reports : and the Greek type, in my eyes, is at present more agreeable than the Gothic letter. But my judgment is not to be corrupted by my imagination. I do not want to be told that the poets can entertain or instruct in matters of antient story ; but what have these things to do with an English lawyer ? You may as well insist upon my making collections of pictures, coins, or fossils.

EUNOMUS.

I shall scarce insist upon your spending your income, and flinging away your time under a notion of improving your taste. Not that I would have you imagine such collections useless to any one, because it might be improper to make them at his own expence. I should be very sorry that you should be at the pains of hunting over all the records in the Tower, and wear out your eyes in transcribing them. And yet, what collections are more valuable in our profession ? In all these cares you must avail yourself of the diligence of others ; or spend your life in heaping up materials which you can never be able to make use of.

POLICRITES.

I begin to see a little clearer the limits of your scheme : for as you do not make it absolutely necessary for me to collect the curiosities of my own country, you will probably dispense with my
being

being acquainted with those of others in person. I was afraid I must have made the tour of Italy, ransacked Herculaneum for antiquities, measured the Pyramids, or have been sent on a pilgrimage to the Holy Land.

EUNOMUS.

No ;—it is not every body that, like Scriblerus, is to make “ his own legs his compasses.” You must be content to travel by description, and worship the echo without expecting to hear the first report. What did your favourite Ulysses more by twenty years travel, than observe the “ *αἴσα καὶ ῥοήν ἀνδρῶν* ?” The first may be done with some profit, less time, and with less danger, by reading the accounts of others. Suppose that your own experience would have made a deeper impression on the mind : and that the accounts of others are often imperfect for want of previous qualifications in those who make them ; then it will follow, that persons must be qualified to improve by travelling as well as any thing else. And that circumstance alone is sufficient to shew, that those who would travel to any purpose must be disengaged from employments at home. Besides, “ men and manners” lay open to observation in one spot as well as another ; and no way of life, I think, can see more of them than your own.

POLICRITES.

You put me in mind of your own river, that reflects every flower that grows on its border : there is scarce a book in your study but I suppose you either have or will allude to in your discourse. How comes it all this while, I have heard so little
of

of my admired Tully, (as you was pleased to call him) and of those "who fulmin'd over Greece," to use the words of a poet*, that I may shew you have made some progress in my conversion.

EUNOMUS.

§. II. I thought the Orators, both of Greece and Rome, had long before this spoken for themselves; and I, by any recommendation of their art, should have been in the condition of Plutarch's Sophist, who after having made a tedious harangue in praise of Hercules, instead of being thanked for his pains, was asked, who had said any thing against Hercules? The Orators of Greece and Rome are qualified as well as the poets to entertain in their turn: the poets, we are told, were their fathers; the likeness is still visible; the latter often resembling the language and turn of sentiment of the poets, and they in their formed speeches, exhibiting some of the best examples of oratory. The speeches of Homer, Virgil, and Milton, have an advantage, of which there is much reason to regret the loss, in the remains of ancient orators. They in many instances contain a complete debate; and the subject is discussed with all the acrimony and invective of a spirited reply. This example has been copied by the antient historians, who to introduce specimens of their eloquence, have indulged a vein of fiction under the air of truth; and composed speeches for their heroes, suited to the occasions and characters they sustain. And who is there, though he knows them to be fictions, though in the severe eye of criticism they are so many violations of historical truth, that would be

* Milton's Paradise Regained.

deprived of those excellent strokes of eloquence, we meet with in Livy or Sallust, Xenophon or Thucydides?

Orators have so near a connection with our profession, that if your knowledge, as a lawyer, is to go any farther than your own breast, (and sure, *scire tuum nihil est*—for what is a lawyer without clients,) how can you hope to communicate it with strength and perspicuity, without some assistance derived from that quarter? Persuasion is commonly the effect of art; and it is an art necessary to be cultivated by lawyers, because their clients, always in opposition to each other, can never have the right and justice of the case in favour of both.

POLICRITES.

I hope you would not compare a wrangle in Westminster-Hall, to a weighty debate in the Roman Senate? Or mistake your own constitution so far, as to think that your orators at the bar are to make law just as they please. They may, and I believe often do, give proofs of their eloquence, by speeches of an hour long; and a reply as long again. I could tell you of those, who, in Shakespear's phrase*, "speak an infinite deal of nothing;" but from the little that I understand, the cases and acts of parliament must at last speak for themselves.

EUNOMUS.

As clear, settled, principles of law, I agree with you authorities cited are never disputed or disputed in vain. But is their own authority always so

* Merchant of Venice.

settled; or their meaning so clear and determined, as to admit of no altercation? Is there no difficulty in connecting them together, in such a manner as to adjust them to the complicated circumstances of the case in question? Or when the law and the fact are ascertained, is there no room upon some occasions to apply to the discretion and equity of the Court?

I am a little surpris'd, however, to hear one that talks of the Constitution, entertain so mean a notion of Westminster-Hall. Have not Englishmen lives and property to defend as well as Romans? And you must needs know they are as jealous of attacks on either.

I will not go so far as to think their opinion worth an answer, who hold, that modern times are strangers to, or rather will not bear Eloquence: because I think they are sufficiently refuted by fact. And the notion is as destitute of sound judgment, as it is contrary to experience. Nor do I think the notion of others is better founded, who maintain, that an English bar will not admit of Eloquence, being of a nature extremely different from the course of judicature in Athens or Rome: from which as we are supposed to be acquainted with the only true models of eloquence; so the circumstances of former times and different forms of policy are thought to exclude all others as much from the application of eloquence, as from a competition with the great orators of those days.

I am speaking to one who knows from history and his own experience, that even here the fact is directly otherwise. But was I to borrow no argument from experience, it would be enough to say in general that Eloquence is the common child of freedom and of knowledge: that in any State, where the maturity of its learning keeps pace with

with the freedom of its constitution, men must have constant opportunities, and they will be able to make the best use of opportunities to persuade or refute; will find ample field for panegyric or satire; will be able to raise or overcome occasional opposition. All which are no other than the various modes and characters of eloquence conceived in the abstract. Nor as to the particular application of it to our profession, should I think those would have very firm ground to stand on, who would argue, that in a constitution governed by law, particularly in the very course of expounding that law, or debating on it, there can be no room for the free use of genuine eloquence: such as, according to the true idea of it, may command the passions while it convinces the judgment; may bear down all opposition, and carry every thing in triumph before it.

To explain myself, I will not scruple to say, an address to a Jury is the field for eloquence; as an address to the Court is for argument. And thus (however they may accidentally intermix) the provinces of strict reasoning and of eloquence, as to the present application of them, are as distinct from each other, as law and fact are. Nor yet would I scruple to allow, that in our books much fewer instances occur of Eloquence than of Logic, though I am contending, that the same Profession is a school for both. The reason is, one is a dry independent art that borrows no assistance from occasion, time, or place: the other is so much indebted to all these, and above all, to the form of expression and the manner of the speaker, that the best account of it at second-hand, compared to its original exertion and influence, is like a print copied from a painting of Titian's or Claude Lorrain's; which may be correct enough, perhaps, as to the design

design, but must be stript of the peculiar excellence of the original, its warmth of colouring. And thus it is, that though, for instance, the elements of Euclid, or some pieces of Aristotle's, are the same to us as they were to those of his own times; the remains of Tully or Demosthenes are not.

With these allowances, I may venture to add, that some few specimens in the State Trials may be looked upon as excellent instances in this Profession, both of argument and of eloquence; tho' I confess for the latter, it is always better worth while to consult the times, than any books whatever.

When I speak of the times, I am tempted in some measure to rest my appeal to the present. For how can we reason better, than from what we are best acquainted with? I have intimated, trial by jury is the proper scene for eloquence: our subject therefore is confined to the Bar without going so high as the Bench. And, I think, in this view I can remind you of the most distinguished characters of eloquence, that all occur at this moment in one single field of action. Of which, if any particular character should be surpassed in other quarters, yet I am sure no other quarter can produce so many together, and so totally different from each other.

The first in order, is a speaker of so uncommon a flow of true natural humour, assisted by great experience and observation of the world, that none but the object of it can refuse to join in the laugh: a second, always clear, sensible, fluent, and insinuating: the next, a nervous and learned speaker, and on occasions a master of the most strong and liberal irony: a fourth excelled by none for solid knowledge of his profession, with a clear, strong,

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and manly style of expression. Then comes another, of whose peculiar excellencies, as a public speaker, if I was to give my own opinion, I should, without a moment's hesitation, refer it to his surprising subtilty and imagination.

After these, if after these, (who are the greatest constellation of orators in our profession, that adorn *any one particular spot out of Westminster-Hall*) it was necessary to look out for a single character, the most perfect in its kind; there is but one that I can remind you of; who, as he unites in himself many of these peculiarities, so the trial by jury, as much distinguishes even him beyond any other exercise of his abilities, as it does in this respect distinguish him from all others; who is confessedly allowed to be with ease the greatest *nisi-prius* lawyer of these days; if he was ever excelled, or even equalled in any other.

The outlines of these few characters, though faintly drawn, yet I hope with some degree of likeness, are sufficient to shew our profession has, in its own peculiar province, some pretensions to eloquence. Besides, those who have acquired eminence in this profession, seldom confine themselves to the duties of this alone. The figure they have always made in the Senate, as well as the Hall, shews the use of eloquence more than any thing I can suggest to recommend it. And though their inclination or their opportunities may not always lead to politics, I mean the care of this kingdom, considered at large with respect to foreign measures, its commerce or its allies; yet sure, under the notion of a legislature, none are more proper to attend and advise the making of good and useful laws, on which the very being of a state depends. Turn to any period in your own history, (you will scarce deny the use of history) you will ever find

form

some illustrious persons sustaining the united characters of lawyers and statesmen.

POLICRITES.

§. 12. I am so far from denying the use of history, English history I mean, that in my opinion, if anything has a direct and immediate connection with law, it is this. I rather wonder, so little of this kind has been left us by persons of this profession. For who can be supposed to be better acquainted with the Constitution, than those whose province it is to defend it in so many shapes; and who, from the nature of their station, are most conversant in records, the pillars of history? who, from their acquaintance with evidence, the manner of stating facts distinctly, and examining what is or is not probable, can better fill up the draught of history as it is left us by one of the best judges of antiquity? “*Nequid falsi dicere audeat, nequid veri non audeat.*”—Perhaps it would be a slender commendation, where the track itself has been so little frequented in this Country, to say none have made a nearer approach to fame, through this avenue, than those who have stood foremost in our Profession. I think I need not explain my meaning by mentioning the histories of Henry the Seventh, and the Civil war. That this track has not been more frequented by some of the same set of men, may be imputed to their want of leisure; in some measure to a delicacy perhaps, in declining to relate transactions, in which their own part, though often considerable, was only short. But in general it is much to be lamented, that in this Country, immortality of reputation, which is one great spur to actions, and wisely made perhaps

The last infirmity of noble minds,

is after all left at the mercy of obscure and private historians. We have few Xenophons and Cæfars; as few Bacons and Clarendons; few in any public capacity who have penned memorials of the times in which they lived; and described the scenes in which they acted themselves.

E U N O M U S.

I wish by your own example you may increase the number: your opinion of history, I see is already strong enough to excuse my silence, as to its profit in your own profession. I will only make an observation that occurs to me at present, with regard to some circumstances that I think more particularly useful to this end.

P O L I C R I T E S.

The only point in which at first hearing I have agreed with you throughout your argument, was so far from being intended to stop you in your observations, that my curiosity and want of information in this particular will make me listen with more pleasure and attention.

E U N O M U S.

§. 13. I only wish you may not repent of your encouragement. As the chief use of history is to teach by examples, I think the drawing characters ought to be well regarded by historians, as it is the clearest manner of exhibiting examples. There are but two methods of doing this: either they introduce

introduce the person into their history by drawing his character previous to the relation of the events that form it; or they kill him first, and then, after the manner of the Ægyptians, scrutinize his conduct. The use of drawing characters is confined only to the principal agents: subordinate instruments are not of sufficient importance to merit such care of the writer or attention of the reader.

In both cases you will easily allow there is this justice due to the person from the historian "in drawing the character corresponding to his actions," that is, such as his actions taken together may warrant. In the language of our profession, the character is to be considered as a verdict founded on the several actions related by the historian, all of which are to be admitted in evidence. And the reader is to judge, whether the historian has given a true character, upon a supposition that all the evidence the historian had, is laid before the reader; for he can decide whether the character is drawn agreeable to that evidence.

But in the first case, writers often, in treating of their own times, give characters from their own personal knowledge; and consequently, they may have evidence which is not laid before the reader, since the general character may have been formed by his cotemporaries on several actions, which make no part of the history; it may fairly be the result of private acquaintance in private life. In such cases it is no impeachment of the justice of the historian, if the actions related do not come up to the character assigned the agent: it is sufficient in the main, that they do not contradict it. The character in these instances, is previously inserted as an explanation of the subsequent actions: and they teach us to examine the judgment of the historian in the account of those actions; since by
being

being previously made acquainted with the character, we shall know whether the motives assigned as the causes of particular actions are just, by their corresponding with the general character. This method, you know, is common with Lord Clarendon, Burnet, and Swift.

§. 14. Among other modes of searching history, the study of comparative history seems of great service. Our knowledge in general, is not so much increased by an accession of new ideas, as by comparing the relations of those ideas we already have. In the same manner the knowledge of the Constitution is advanced by comparative history: that is, by comparing similar events in the course of history; and by comparing the different accounts of the same event by different historians. The latter tends to establish facts, as the other does to apply them. It is little more than idle curiosity, to treasure up facts without applying them; but it would be dangerous to apply them to other cases before their own credit is sufficiently established.

§. 15. I think there can hardly be any doubt that history is of great use in studying the law of nations: indeed hardly any point can arise in the law of nations, but what may be proved or illustrated from thence. And the reason is plain. The custom, usage, and practice of different nations have, in many points that are indifferent in themselves, and not of natural obligation, been considered as the law of nations: and it is the business of the historian to record this practice and usage, as far as it is connected with his proper subject. But when the law of nations is considered only as the law of nature applied to societies, and so extends the obligations from nation to nation, which arise by nature between man and man; the use of history is
less

less absolute; and the examples it gives are to be considered not as proofs, but illustrations only. The reason is likewise plain: because in this case it is the business of history, "to find the fact and not the law." The eternal difference between virtue and vice, will render the quality of an action under given circumstances, precisely the same in all ages. And therefore the number of examples in history to any one point, will not create law in this respect, as it does in the other. And this difference must ever be attended to, or history will mislead reason by false colours.

There is a natural connection between "law and fact;" I would almost venture to place them among Mr. Locke's inseparable ideas. The latter undoubtedly gives rise to the former, considered as positive institution: for there are few things a legislature can foresee before they happen; and the latter scarce ever do happen, but the mind, in its survey of them, calls in the assistance of the former, (the former I now mean in a more extended sense) by enquiring whether what has been done, is agreeable to the natural notions of reason, or the deductions of reason applied by positive laws to the convenience of society.

There must be the same connection between "law and history," that there is between law and fact: for whether we hear of the facts or read of them in history, can make no difference; we judge of them by the same rule in either case. The historian indeed has it in his power to help us to form this judgment: and you well know this has been laid down as a rule for writing history; and the best writers (who in reality in all arts furnish the rules) have complied with it. It is this that distinguishes Livy, for instance, from the "Annales Pontificum," the early form of history, which
you

you may imagine was as dry as a parish register, or at best on a level with a Gazette.

§. 16. But to apply this reasoning more particularly to our subject: the connection between the law of England and the history of England, is founded on their reciprocal uses to each other. And the use of history to law, is evident in these particulars among others.

1. In giving the proper weight to written evidence, by enabling us to consider the times of which it bears witness. Written evidence is of the highest use in matters of the greatest consequence, whether public or private in their nature; in questions of antient right, prescriptions, and the like. And the written exhibits, produced either on the same side as parole evidence, or opposed to parole evidence, can never have their true force computed, without considering, besides many internal circumstances, (as their nature, how preserved, in whose custody, &c.) the state of public affairs at the time they bear date: and likewise in many cases, the intervening history to the rise of the question; because the temper of the kingdom, the prevailing notions (as I shall have occasion to observe) often temporary and unconstitutional; the peace or disorder of the times; compared together as the subject requires, will best account for many things of this kind. And this comment of history on old instruments and exhibits, serves the same purpose as cross examination does on the testimony of living witnesses; it sifts the truth, and separates the dross from the ore.

2. An infinite number of questions receive the only light they are capable of from the reflection of history; in a different view, I mean, than that already mentioned, of controuling written evidence. In cases of private property, as tythes, customs

customs of places, manorial rights, &c. in these and many other particulars, it is necessary to know the original of the matter in question, what the present state of things succeeded, and what has been its progress. History too in this case will not only explain subsequent laws, but will supply the silence of law itself.

3. History, well attended to, will furnish useful observations, and a kind of criticism on law books themselves, with regard to their doctrine. For our reasoning in this respect may sometimes be extremely fallacious; and mistakes may be of the worst consequence. We take a Report Book in hand, suppose; the case we consult is extremely clear perhaps, and consistent with itself; but the doctrine startles us as remarkable. We therefore look into a cotemporary report: here too, suppose, we find the same doctrine grounded on the same circumstances of the case: and the credit of each report is confirmed by its consistency with the other. But if the credit of the doctrine itself is in question; we must look into the times; consider who were the Judges, inquire into their character, in particular, from history, where history has been at all particular on the subject: and see whether it was a time, when "the little finger of the law was heavier than the loins of the prerogative;" or whether the servility of the times was such, that the case was inverted in favour of the prerogative.

The times, I say, will explain law as well as facts. It is in this view only, and with the comment of history, that we understand the doctrine (for instance) laid down by a Chief Justice in support of a dispensing power, "that the laws of England are the King's laws—that it is his prerogative to dispense with them on all urgent occasions,

“cassions, of which he is the sole judge—and that
 “this right is not to be taken from him.” The
 Chief Justice, however, argued logically, though
 not legally: allow him his principle, (and in sup-
 port of that principle, a power of putting any
 sense he pleases on his assertion) that the “laws
 “are the king’s laws,” and his conclusion will
 follow, and to much greater extent than perhaps
 he intended. His principle would soon abolish a
 Parliament: for to what purpose, in any case what-
 ever, is the concurrence of both Houses necessary
 to make laws, which it is the King’s inseparable
 prerogative to break through?

Or can there be a more detestable prostitution of
 that awful character, than to be of opinion (as
 there were it seems some of opinion in 10 Rich.
 II.) that it is treason in a Parliament to proceed on
 any business in an order contrary to what the King
 may appoint? No wonder the same men, at the
 same time, maintained it was treason in a Parlia-
 ment to impeach a Judge for his offences: no won-
 der too, that the Parliament afterwards refuted
 this opinion by impeaching those very Judges, and
 sacrificing them for their corruption.

One is rather more shocked at these doctrines,
 when they apparently affect life, than when they
 only aim at the invasion of property. What can
 we say, to find it held in construction of an act,
 “requiring two witnesses for treason,” that one
 witness of his own knowledge, and another by
 hearing from him, though at the third or fourth
 hand made two witnesses or accusers within the
 act. And yet this, every man (says a very honest
 and learned Judge) “who will do so much pen-
 “ance as to read over the state trials during the
 “reigns of Queen Elizabeth, and King James,
 “will

“ will find to have been the doctrines and practice of the times.”

The truth is, the making Judges the mere tools of the crown; and setting one Judge to tamper with all the rest, to know his opinion before-hand, and sometimes to direct it, has been in distant times too much practised to make any unconstitutional opinion at all, unexpected from those few men who were not secured by good principles of their own. For while there were any Judges who wanted liberal education or principles, and Judges were entirely dependent on the crown, and the crown itself was on the heads of despotic or misguided princes, bad men, when placed on the Bench, must have been more liable to temptation; and the Constitution, ever in some degree at their mercy, more liable to a wreck, than when their seat, to the immortal honour of our present Sovereign, became fixed for life; and the crown, as it now is and has long been, above those mean and dangerous practices of corrupting the fountains of law, merely to give the most odious colours to temporary opposition.

I know not how I have fallen into a digression of history, when I intended only to shew the connection law has with history: I will only further observe, that you may find too in the course of history, that the times will account for the particularity of laws themselves, as well as opinions on laws. It is equally true of all times, perhaps, what Chief Justice Vaughan said of the æra of acknowledging the King's supremacy—“ that laws were then made, which in the circumstances of another time, would not have been made.” It is in a manner the genius of positive laws, to be called forth by particular events; and it is from
hence

hence they principally differ from the laws of nature, which are universal and immutable.

POLICRITES.

You have more reason to expect my thanks for your digression, than I have your apology. But I would not have you imagine what you call prolixity in this respect, will excuse an omission in another. You have, according to your own division, handled only one part of the question: I expect now to hear what is the return made by law to history.

EUNOMUS.

Very ample returns indeed, if from hence history borrows its best materials, as you rightly observed by calling records, the pillars of history. And who can doubt but from this quarter, in the most extended view, the greatest events are to be looked for? Such as are most remarkable in their nature, and are the genuine, though secret causes of things that make more noise indeed in the world, and take up more room in history. Victories and triumphs, it is true, make a deeper impression on common minds; but their laurels fade almost as soon as gathered. Treaties and alliances (which, however, as contracts, are objects of law) are connected with wars; but neither treaties, nor wars arising from them or producing them, deserve to be remembered, unless entered on in defence of our rights. Mere ambition tramples on security as well as justice. Turns of policy are to be referred to the same standard. And it is amazing from what seemingly inconsiderable causes (in questions of civil right) some of the most extensive schemes
of

of policy have either been produced or promoted ; that have been at length like rivers falling into the ocean, though their source was at a great distance, and so minute as to be scarce discernible. I need not remind you of the case of ship-money ; or the foundation that was laid for the dispensing power in the trial of a private recusant ; and the visible effect that had in the revival of popery ; till in the end it produced the Revolution. All these cases shew, how much, as I before hinted, it lays in their power to preserve the Constitution, whom the Constitution has made the guardians of its laws.

But I have been too long in these observations, considering I have as just a claim on your attention in other respects. Our Profession, though principally that of the common law, (and I hope you will always consider it as such) is not however averse to the study of other laws, to which, under the denomination of the common law, that is, (in my present meaning) the laws of England, it here stands opposed.

§. 17. The law of Nature not only should be studied as the ground of the great and fundamental laws in all societies, but, because the "state of Nature" itself does still subsist in many respects, notwithstanding the intervention of society.

1. It is plain different states with respect to each other, are still in the same condition that different men were in before any society was formed ; that is, naturally equal and independent. That natural freedom subsists in all cases, where it is not abridged by a mutual and voluntary treaty. Nay, even a violation of treaties, as well as an invasion of natural rights, must be avenged by natural means. No other state has a right to determine their differences upon an appeal ; and if any state interposes
without

without mutual consent, it justly risques the enmity of the one, by adopting the cause of the other.

2. But even in any particular society (governed, if you will, by as excellent laws as our own) the state of nature must in some respect subsist between the members. It must subsist in those very few cases, where the laws of the community cannot be appealed to. And hence it is, that all governments have allowed of self-defence in those cases, where the laws made for their preservation, cannot be appealed to till it is too late.

This right of self-defence in cases of extreme necessity, that remains in any one man after the existence of society, has, you know, been applied (as it may a fortiori be applied) to the right of the whole body of men in a society, to defend themselves against such tyranny of its head, as *necessarily and directly in its own nature subverts the Constitution.*

It is on this principle Mr. Locke so nobly vindicated the *Revolution* from the clearest dictates of natural reason. His treatise is one of the most solid pieces of reasoning, and at the same time the most artful vindication of the public measures at that time. It is like those mathematical lines which come infinitely near a curve without ever touching it. You see in every step a defence of the Revolution, though the Revolution is not so much as named. It was his business to reason only from principles: the particular case he knew would apply so close to those principles, that the passions might be taken unawares, while they were asleep: whereas, had he constantly kept the event in view, and reasoned upwards from the event to its cause, so many little views of party or interest, would, in his time, have mixed themselves in many readers enquiries,

enquiries, that reason might in the end have been silenced, and the passions have gotten the better.

The opposers of his doctrine, the advocates for hereditary, indefeasible right to the Crown, must clearly exclude the notion of a trust in him that wears it: a trust so high in its nature, and ever so strongly recognised in the oath of every one that wears it. These gentlemen must, I say, exclude this trust, and consider a right to the Crown, like any other species of mere descendible property. And then, to be sure, they argue well, though on the same narrow rules of law, as they would about the title "of a pig-stye or a lay-stall," to use the expression of a great advocate for civil liberty: an absurdity not less than what Addison exhibits in an imaginary drama, of some young lawyers at a coffee-house, settling the succession to the French monarchy by their own statute law.

3. But there are things likewise, as well as persons, that still remain in a state of nature: not being subject to those rules of property that civil states have established as to other things. Such is the ocean and the fish in it—the water of a river—birds of an untame nature—the right of enjoying the common light and air: the right of enjoying these is from nature, though the protection of that right is from society; and hence, in many cases, remedies are given by our law, for obstructing the one and corrupting the other.

4. Nay, there are some regular assemblages of men, under the appearance indeed of society, that either with respect to the rest of mankind, or with regard to the individuals that compose them, may be still deemed in a state of nature; little more than mere occupants of the spot they inhabit; and scarce united by any civil ties, laws, or contract.

Many

Many writers rank the Piratic states of Barbary in the first class; as Mr. Locke does all absolute monarchies in the latter. His argument, if I remember right, is, that it is the business of society to appoint some common rule, which may be appealed to in every man's case; that no man may be a judge in his own, as he must be in a state of nature. And therefore, in any government, if the will of a prince is so absolute as to admit of no appeal, all his subjects are still in a state of nature; with this difference, that the Prince, instead of judging (and perhaps judging corruptly) in a case really his own, may make every case his own; and decide, without law or appeal, the case of every person in his dominions. And with this further difference, that a person in a state of nature, indeed, is exposed to the arbitrary power of all he meets with; but in a despotic government, he is exposed to the arbitrary power of a single person, who has an absolute command of many thousand men to enforce obedience to his will. Think of this, and bless yourself; you are born neither a Russ nor a Turk.

§. 18. The civil and canon laws are not to be forgotten, as part of our scheme: and both these, as in many cases they furnish the grounds of proceeding in the temporal courts, in many instances are still used; and the jurisdiction of courts proceeding by their rules, often devolve upon the common law Judges, are evidently connected with the study of our law.

POLICRITES.

I give very little credit to general assertions; and so be pleased to take a little trouble to explain yourself, as you are sure to give me a great deal if you do it with success.

EUNOMUS.

EUNOMUS.

You will very easily understand the necessity of regarding each in its turn.

And first as to the Civil Law. Many of our antient writers, it is well known, often adopt the terms and reasoning of the Civil Law. I grant, for this reason they ought to be studied with caution; and to do this, you must know, when and from whence they borrow their notions. I agree with a learned Judge, "it was no wonder that " Bracton, (for instance) who was a Doctor of " both laws before he came to our bench, having " no tolerable system of the English law, then in " its infant state, should adopt what he found in " the Books of the Civil and Canon Law."—But one cannot consider with patience, the attempts of Cowell in a more enlightened age, to form a narrow system of the law of England in exact conformity to the Roman Institute: or that he should be countenanced, nay, encouraged in this attempt by the reigning Prince.

It was no uncommon thing we are told, for that King, to prefer the Civil to the Common Law; though in a speech in Parliament, he as extravagantly retracted his preference, by saying, "if he " was to chuse a law for this kingdom, he would " prefer the National Law, to the very law of " God." And yet in the very same speech, within a few lines, he wished for the " settling " and amendment of that very law:" though every body knows, he afterwards rejected the best opportunity, that may ever occur, in a proposal of Lord Bacon, in conjunction with the greatest lawyers of that time.

The Civil Law, however, in due subordination, deserves on many accounts to be studied by the Professors of our own.

The Law of England often borrows the rules of the Civil Law, in the construction of wills and trusts: the latter was the offspring of the Civil Law, and both are treated by it with great precision and exactness. Our Law too has, perhaps, borrowed, at least agrees with the Civil Law in, many other particulars.

In these, which will occur to any one turning over a system of the Civil Law, and competently read in our own, a pleasing analogy will be easily observed. The comparison, however, may (as it has been somewhere expressed) be more often like a globe and a plane, that touch only in one point, than like two planes which have an entire coincidence.

The difference of the two systems in similar objects, will not, perhaps, be less pleasing to an Englishman, or less instructive, than their agreement in some particulars. And how widely do we differ in laws of proximity; privileges of women; rules of evidence; rights of prerogative; attestations of wills, and institutions of heirs under them? and happy for us almost entirely in criminal proceedings, as well as in the punishment of crimes, and very often the ideas of crimes themselves?

I need not, after these weighty distinctions, mention some lighter shades, such as the revocation of gifts for ingratitude; or in the donatio propter nuptias, where the match was broke off, with the extraordinary refinement of allowing the lady to retain half her portion as the price of a kiss.

§. 19. You will think it less surprising, that our law should have a mixture of the Canon rather than

than the Civil Law ; as the Popes, you know, had a much longer and in one sense a more absolute dominion here than the Emperors : and though while Britain was under the Roman government, it would not be altogether a stranger to the Roman Law, yet the Saxon invasion seems in a great measure to have swept it away. It was a mere accidental discovery of part of it, that gave the whole any footing in the west of Europe : and the times in which this discovery was made, when many states were far advanced in their legal policy, will easily account for its inconsiderable progress.

Indeed, whatever reception it has met with in England, was the effect of silent conformity, not of legislative interposition ; neither the Civil nor Canon Law, could have any real weight here, without a parliamentary sanction. Any attempts of this kind were unlikely to be made in favour of the first ; they were made, but sometimes they were resisted with vigour as to the latter. Witness the memorable unanimity of the peers at Merton, in refusing to legitimate children born before marriage ; as the Canonists would have had them.

We have, however, many points of antiquity, as well as daily practice, from the Canon Law. The primitive institution of our terms, the custom of not going on with the business of the term in the afternoon, the singular conceit of prohibiting Jurors, meat, drink, or candle-light, till they are agreed in their verdict ; Sir Henry Spelman will tell you, are all either the text, or by way of gloss on the Canon Law.

Many rules concerning the church, as to advowsons, patronage, rights of presentation ; others with regard to matrimony, privilege of clergy ; and concerning testaments, are derived from the same source. Instances enough might soon be produced

duced to justify Chief Justice Vaughan, in saying,
 “ that though the knowledge of the Canon Law
 “ be not an adequate subject to an English lawyer,
 “ yet it is a subject in common.”

I will not stop to insinuate the use of other laws, and of foreign writers, in many questions, that are agitated in our courts of a very liberal nature; such as the privileges of ambassadors, mercantile questions, nice points about the force of our laws in conquered countries; or the validity of our own laws, when they interfere with those of other states. These might be curious, but would be too minute particulars, to interrupt an account of other systems, that have in course of time, been deeply interwoven in our own.

After what has been said, the law of nature and the law of nations, I think, may be justly recommended as necessary to be studied: they being in effect only so many applications of morality to a new set of objects. The Civil and the Canon Laws you will allow me to recommend, though on narrower grounds: they are not, it is true, like the Law of Nature, the common ancestor of all those independent maxims of justice, that are the foundations of all positive Laws; they are, however, undoubtedly the parents of many particular maxims in our law, and discover a relation by the similitude of features.

§. 20. The same similitude of features, and the same relation have been discovered between many parts of our own and the old Feudal Law. An English Lawyer, if he would attain the true perfection of his art, has, like the painter, his Lombard and Italian schools: our municipal system in its progress, has copied the great draughts in them both. I have already mentioned instances enough in the one, and will just observe from memory,
 some

some particulars in which it has copied the other. The Laws of Descent still prevailing; and the whole doctrine of Tenures, now in a great measure abolished, are all grafted on this stock. These are points, to which I can call you so many learned and unexceptionable witnesses, among our legal antiquarians, that I will neither labour to prove nor explain them.

§. 21. I cannot pretend to say our Law has expressly copied from any other positive systems, than what I have mentioned: though it may, and does in some instances, resemble the particular constitutions of others. But consider in the course of history, the variety of invasions this island has sustained, most of them in their turns productive of Laws; consider, in a happier view, the mixed body of the English legislature; men various in their talents, their education, their pursuits and connections; many of them improved by an experience and knowledge of other countries; consider all this, and it will be no wonder that the law we live under is as compound as the atmosphere in which we breathe: that the political maxims of other states are adopted and made to conform to the genius of this: and by a kind of legislative commerce, the defects of our natural growth (if such occur) are improved by the importation of foreign productions.

Thus, Policrites, have I sufficiently insisted on the connection the study of the law has with other sciences; whether I have made it out to your satisfaction, you are the best judge.

POLICRITES,

The only doubt I have now remaining, is, in what manner the practice is to come near the theory? Let me hear you a little on this head.

EUNOMUS.

EUNOMUS.

§. 22. I know not whether you mean to crown my labours with a compliment or a reflection: either to do me the injustice to suppose that I was, from the false light of vanity, delineating my own attainments, or that I should have the presumption to lay down rules for acquiring what I will own to you I never expect to attain. In both respects, my friend, you have mistaken the drift of my argument. It is easy to conceive and propose much more than it is possible to effect: and in that light, the conquest of all those sciences, consistent with your own, may, perhaps, be deemed. I was desired only to explain this connection; I did it to vindicate the law from an illiberal notion, under which too many have represented it; and to shew that it is a science not only connected with others, but in some measure including them all.

If Tully, who was himself the model of eloquence to his own and all succeeding times, could form an idea of a higher perfection than he could reach: I hope I shall be excused in adding, one may conceive more excellencies than any one lawyer ever possessed: though perhaps it ought to be the utmost of one's wish to be able to imitate the examples before us; more may not be granted to man. But the model of perfection here, like the Helen of Zeuxis, is to be formed in the mind by an imaginary assemblage of the greatest peculiarities of different persons; and so may constitute a happy union, which can no more become visible than Plato's virtue.

To encourage you, Policrites, I need only add, Industry must be your secret: it is at least as necessary in this Profession as in any other. You must contrive to live longer than others in less time; and

and must date life by the application of time, rather than the number of years that barely mark its duration: which may be done by less vigilance than the "*sex horas somno*" of your master Coke. It has been a prevailing notion in all ages, that a lawyer must rise early. The *Gnavus mane forum*—and *Ad galli cantum*—of our friend Horace, will be good standing lessons: and I don't know why Homer may not speak to a "Counsellor at Law," (as well as a statesman) when he says

Οὐ γὰρ παννύχιον εὐδῶν βεληφύρον Ἄνδρα.

POLICRITES.

§. 23. But after all, the Law, independent of other auxiliary arts, is itself of such vast extent, that it is difficult to know how one person may be master of the several branches of it. It was this view that raised in me those hasty reflections that you checked in the first origin; and by a very fair induction have proved to be inconsistent with that zeal I endeavoured to shew for my Profession. I could now wish you would ease me of a burthen I still have on my spirits, by pointing out in some degree, the connection that the several branches of the Law have one with another.

But I see you have some company at the other end of the garden, who are coming this way. All that I can expect now is your promise to entertain me upon this subject another time.

EUNOMUS.

You may depend upon it, I shall readily do all that lays in my power; and you shall be welcome to my best endeavours the next time you come.

EUNOMUS.

The first of the year was a very
cold one, and the weather was
very disagreeable. The snow
was very deep, and the wind
was very strong. The people
were very much distressed,
and the cattle were very
suffering. The people were
very much distressed, and the
cattle were very suffering.

The second of the year was a
very cold one, and the weather
was very disagreeable. The
snow was very deep, and the
wind was very strong. The
people were very much distressed,
and the cattle were very
suffering. The people were
very much distressed, and the
cattle were very suffering.

The third of the year was a
very cold one, and the weather
was very disagreeable. The
snow was very deep, and the
wind was very strong. The
people were very much distressed,
and the cattle were very
suffering. The people were
very much distressed, and the
cattle were very suffering.

E U N O M U S.

D I A L O G U E II.

Sunt Jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere Injurix aut ratione actionis errare possit: expressæ sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria publicæ a Prætore Formulæ, ad quas privata lis accommodatur.

Cic. pro Q. Rosc. §. 8.

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EUNOMUS.

DIALOGUE II.

§. 1. ABOUT a week after the former visit, Policrites determined to put his friend in mind of the promise he then made him, of continuing the subject of their former conversation.

Accordingly he set out early in the morning, and found Eunomus enjoying the serenity of the season, under the shade of an aged oak, in a field not far from the house. I hope (said he to Eunomus) you will not think I intend to be less attentive to your discourse, though on a dry subject, when I propose that you should begin it where you are. What conversation can be more agreeable than that transcribed from the Tusculan retreat? Or do you think these fields are more averse to Law, than the "Olive grove of Academe" was to Philosophy?

Not to canvass the reality of the charming conversations laid in those places (replied Eunomus, with some rapture) you surely do not forget, that the existence of those Athenian shades you mention, were thought, even by a friend of Plato's, to have been chiefly in Plato's writings. And I cannot help thinking, that many of those haunts of philosophers and poets we read of, if not altogether

gether created, are chiefly immortalized by description. Undoubtedly it is in the power of fancy to make the reflection often more agreeable, than the real images themselves: either by separating certain circumstances, which may deform the things themselves; or by combining in the imagination what Nature has kept distinct. But, I know not how, the few Moderns who have printed conversations, have generally been so far of your opinion, as to lay the scene of them out of doors; either, we are told, they were held in a garden, in an evening's walk, or under a rock by the sea side. Whether all this is done by way of improving upon the Antients; or whether writers of this cast, think by such plastic scenery to work upon the minds of their readers, and to pre-engage the affections on their side, by transfusing a calm of mind, most proper for their disquisitions, I will not determine: but that method will not be so proper for us. The assistance of books will be so necessary to perform in any degree, what you asked of me, that without any insinuation of your being likely to listen to the bleating of yonder sheep, rather than to me; or keeping your eye fixed on the corn, some time after I have done talking of trespasses: Without any suspicions (I say) of this kind, it will be more adviseable for us to adjourn to the study

. . . . Which Policrites readily agreed to, when Eunomus had promised him, that to avoid the interruption they met with last time, he would not be at home to any one.

§. 2. When they had retired within doors, and were seated, Policrites began, by observing, that whatever connection in Theory might subsist, tho' he much doubted, whether there was any connection between the several branches of our Law, as
they

they properly fall under the attention and practise of Lawyers, he was amazed to think, how they could ever be examined by the same person : many of them seeming to be a profession of themselves, and treated as such, in reality, by those who addict themselves to one branch only, however dependent that branch might be on others. Do but consider (said he) the species of men called special Pleaders : a life occupied in drawing declarations, pleas, and demurrers ! These people furnish the language and conversation of Courts ; yet few of them are seen there themselves ; like Poets, they plan the drama, which others are left to perform. And then turn your eye on the Conveyancers, what heaps of precedents are they forced to examine, transcribe and imitate ? There are others again, always upon the wing ; their life one continued scene of controversy, with Plaintiff and Defendant perpetually ringing in their ears ! If they had the real ubiquity which the law figuratively ascribes to the King, of " being present in all his Courts at once," it would scarce answer their purpose, unless they had as many eyes, ears, and tongues, as Virgil's Fame. Then of what a jargon of different languages are our Laws composed, and commented in ? I would even consent to have our own native tongue proscribed from our Courts, rather than have it increase the variety and discord of our style ; when any one language, either Latin or French, (which, however, in our use of them, are so patched and party-coloured, as to be full as much one as the other) would express the sense with equal clearness and precision. Besides this, the very Courts are barriers to their own Counsel ; the experience of Common Law and Equity being too diffusive to mix well together. Consider all this, and tell me, what leisure can they have

to examine the theory of their own particular Art? How much less can they be able to form an acquaintance with History, and the genius of the whole English Law and Constitution? And after this, to soar with Plato till they reach the spirit of all Laws, derived from the nature, faculties, and situation of man, as endowed with reason and formed for society?

E U N O M U S.

Your imagination must descend a little from these very high flights before I can expect to convince your reason or clear your doubts. I am glad, however, to see the effects of our last conference in the restoration of Plato to your esteem, whom I never thought to have heard mentioned so honourably, from your temper at that time. I must hope too, that you will not expect me to answer all those questions in one breath, as you have proposed them. To do them justice, I must handle them distinctly.

You seem to me to have thought it a necessary qualification for your profession to be ready to take either side of a question to argue: I can scarce otherwise account for the singularity of your conduct on this occasion, in chusing to set out in viewing every thing on the wrong side. I might for that reason begin, by reminding you, that every one ought to have a good opinion of his own Profession; at least let the good and the bad be weighed together. I may venture to affirm in this case, the light and shade will form a juster portrait and a more pleasing picture. This I should have more largely insisted on, if I had not some suspicions, that the choice of the wrong side of the question was at bottom directed by farther views

views than that of opening a field of argument; and was in reality intended to echo the objections of the world; and after a fair controversy, if possible, to silence them. At least I will do you the justice to say, you have many on your side: and as error defended by example, may pass for truth, it will be better worth while to strip it of its disguise.

§. 3. One observation, however, seems to be entirely your own; it is not certainly the voice of the multitude: and though it carries with it the air of scholarship, does not seem so well supported by good sense, by which I would ever wish to see learning distinguished. Your objection, I think, to state it fairly, is not so much that the laws are published, and practice carried on in our native tongue, but that other languages are intermixed with it; and thence you seem to argue, that if our own tongue is not sufficient for the purpose, rather make use of any other that is, than introduce such a confusion by variety.

POLICRITES.

You have stated my objection in terms; but before you answer it, see what I have to say in aid of it. I am not speaking against an Act of Parliament: it is sufficient for the world, that the English language has gained possession by law. The reasons for making and for continuing the law, it is my duty to suppose, exist at this day, as the law itself does: I only ask what those reasons are? Why has not the English language a more universal dominion, in exclusion even of terms of art, barbarous in this view and absurd. If the English language is not adequate to every purpose, the Latin is: at least our ancestors, in the universal
use

use of it, were not so wise as I am willing to esteem them. 1. It is evident that for many centuries, the Latin language was almost the general vehicle of the sense of the nation in Records, Acts of Parliament, and even in private Deeds: and without going back to the Saxon period, Last Wills themselves were penned in this language.

2. That the Latin language (for the French, as a living one, was, though much used, always liable to some of my objections) has been employed, not only by our own, but by all civilized nations in their Law proceedings.

3. It can scarce, from so constant a use of it, be said to be unnatural, though a dead language: nor is it, as such, peculiarly unintelligible: and though you was pleased to say my objection was not the voice of the multitude, who, to be sure, would not give up their own language, yet, I believe, the multitude are as much strangers to the subject, though it is in their own language, as if it was in a Latin. But now in the mean time, how did the multitude do from the Conquest till Q. Elizabeth's time? Practice, perhaps, began to indulge them with the free use of their own language at that time; but the Law did not interpose in their favour till the other day. The subject then, I conclude, not the language, is to be blamed as unintelligible.

4. But if the people had no real disadvantage from their ignorance of a "dead Language," I am sure they had real advantages in its certainty and conciseness, which they in vain expect from a living one. Our own in particular has, in this respect, been found to be immoderately prolix and equivocal. Why? But because every man, with scarce learning enough to have entitled himself to clergy in former times, is master of his own language enough to make him think he can draw
pleading

pleadings and conveyances. And why, though he uses every word in the Language, when one alone would have expressed his meaning, or have answered the purpose, is it still liable to perpetual dispute; but, because a living Language must always be most open to subterfuge, equivocation and reserve? In proof of this assertion, I shall barely appeal to our modern wills, settlements, and pleadings, compared with those of our ancestors; which are equally exceeded in length, and in being subject to dispute.

5. One argument I shall sum up all in, that the profession has at least a chance of being more liberal in that view than in this. Dictionaries and abridgments will not then have the chief hand in making some Lawyers; and the Profession by being more learned will become more liberal: for though I do not insinuate, that purity of practice, which is essential to the liberality of a profession, is a necessary consequence of greater knowledge; yet, upon the whole, it is a more probable consequence than otherwise. Thus you have my reasons for the objection; I will rather presume upon your memory, than tire your patience in recapitulating; and will not affect perorations, where I would not wish to persuade.

EUNOMUS,

Perhaps you will disclaim affecting the art of the disputant, as you have done that of the orator: and yet, I know not how, you have been tempted to mislead by fallacy, and to mistake the shadow of truth, for truth itself. Do not think I mean to laugh at your arguments, instead of answering them, when I profess myself surprised that you, who on all occasions, I know, are as much an

H

advocate

advocate for the muses, as you appear to be for the Latin Language on this occasion, do not insist, that all our Laws and Law-Proceedings ought to be in verse. Bad verse would be as tolerable as bad Latin; the difficulties and delays of pleading would not be much greater in this respect than they were before; they would be in a few learned hands, as they were when Proceedings were in Latin. And as practice is the capital argument to recommend one absurdity, I do not think it would be wholly deficient in this. I might, as you have done, mention with triumph, that not only Records, but Charters and Wills have been written in verse; Embassies have been delivered in verse; Histories have often been penned in metre; nay, as verse is agreed to have been the original form of all writing, why should not all kinds of writing still appear now and then in this form, as well as in plain prose. It is clear we have antiquity to countenance even this absurdity. Aristotle tells you, the Agathyrsi had all their Laws in verse; and Tacitus, that the Germans had no annals but what were so: and your own country Druids, were both Poets and Lawgivers; "*Magnum numerum versuum ediscere dicuntur,*" says Cæsar: you know they rarely committed any thing sacred to writing, or else undoubtedly they would have left their mysteries in verse. This way of talking would have been a sufficient answer to your argument, deduced from mere practice and example, if you had not urged the antiquity and extent of the practice in this respect, as presumptive evidence of its being reasonable. I am now, therefore, to encounter the argument in a more serious manner. And the first thing I must take notice of is, that what "you was pleased to sum up all in," might, without any prejudice to your cause, have been entirely

entirely omitted. We are of one mind in our wishes, as to the liberality of the Profession; but I must differ from you, in thinking that important point is at all concerned in the present question. I agree with you in allowing the Profession has a fairer chance of being more liberal, as it is more learned: and, I believe, the fact will bear me out in saying, the Professors of the Law were never more generally learned, than they are at this time. It is much owing, no doubt, to the education of the times; when the University is made the almost constant step to the Bar. And it is with the utmost pleasure, in this view, that I recollect the late noble regulation of our Law-societies, so commendably unanimous in promoting this plan of study; that when themselves have been styled of old "Universities;" and certainly are, in their nature, a noble model of Academical Institution, for the single purpose of studying Municipal Law; they have yet paid that just respect to the Universities where science ranges at large; have considered how necessary the elements of other parts of learning, taught to any purpose in those places alone, are, towards forming a Lawyer properly so called, that they have allowed the time spent in College, to make up part of the limited standing for the Bar: and have by those means, I hope, made what had before been too much a by-path to the Profession, the public road to Westminster-Hall. But as Westminster-Hall itself is a public road for the whole Kingdom; and the greatest part of those who are obliged to travel it, have never been at the University, what obstacles would you throw in your Clients way, by making them hear their Cases disputed in an unknown tongue? by making them pay for having all their concerns translated into Latin, and after all, have Judgment against them,

merely because your Latin is bad? because you have expressed them in words not to be understood; when, in reality, there are no words in the Language to express them in? or to avoid the risk of a probable inconvenience, run into a certain one much greater, by swelling the Record with an *anglicé* in every sentence, as the constant practice was, because the furniture of a kitchen or a shop (for instance) cannot be intelligibly rendered into Latin?

I must allow, the obscurity of Law Proceedings will subsist to every body but Lawyers, was it entirely in an English dress. And this will be a vindication of its not being so; but still making use of an intermixture of Latin and Norman words. That obscurity is owing no doubt to the use of technical terms: and any one in England, not conversant in Law Proceedings, would I believe, no more understand Sir Thomas More's question, put into English, than the Sophist at Brussels did, when it was in Latin. The anecdote is this: It seems, according to the humour of those times, public Theses were maintained in the University at Brussels, during which, a formidable disputant started up, who gave a challenge to all mankind; and was ready to enter the lists on any question, in any art, or science. Sir Thomas (who was then part of the English Ambassador's retinue) accepted the challenge, and with great humour stated a question, the very terms of which, he was sure, none but an Englishman, and a Lawyer, could understand: two great chances on his side! it was *An averia capta in withernamiâ sint irreplegibilia?* That is, "whether beasts taken in withernam are irrepleviable?"—for my argument will not lose by translating it. A knowledge of the Language, it is plain, would not lead to a knowledge of the question.

question. The consequence was; the Sophist was struck dumb, and the whole City, we are told, were happy in having his arrogance so artfully defeated. Apply this story to our present subject: it is not the dead or the living Language in either case, but the technical terms that occasion the obscurity. When a Mechanic speaks to me of the instruments and operations of his trade, I shall be as unlikely to comprehend him, as he would me in the Language of my Profession, though we both of us spoke English all the while. Is it wonderful then, if in systems of Law, and especially among the hasty recruits of commentators, you meet (to use Lord Coke's expression) with a whole army of words that can not defend themselves in a grammatical war? Technical Language, in all cases, is formed from the most intimate knowledge of any art. One word stands for a great many, as it is always to be resolved into many ideas by definitions. It is, therefore, unintelligible, because it is concise, and it is useful for the same reason.

Though what I have offered will be a sufficient reason for using our own Language as far as we can; and some vindication for using foreign terms, where we can not: something may be said for that great harshness of style, which we must still be doomed to encounter in our old Books, Records, and Acts of Parliament.

The barbarity of style then, in our old Books and Laws, arises, I conceive, from one or both of these causes. 1. Either from the use of words, ever unknown to the Language in which they are penned: or, 2. From the obsolescence of the Language. I do not see why either should at all reflect upon Law Proceedings, because they are both common to other compositions, in certain circumstances, as well as to Laws.

1. The

1. The obscurity arises from the use of such words as were before unknown to the Language; which is the case of many terms of art, that have an additional obscurity to that of their being confined to the art itself, and never applied in common life, in their being often borrowed from the laws or usage of other countries, where the terms were, perhaps, proper and familiar. And this is the case where one nation learns any art or science, already established and grown up to maturity in another. It is what we have done as to Painting and Music from Italy, as to Philosophy from Greece and Rome, and as to Legal Terms, in many respects, from the Normans.

All then that can be done in any composition, to familiarise foreign terms, is to give them a termination suitable to the Language into which they are introduced. This is what our Laws, when written in Latin, have done to Norman and Saxon terms. This (as Sir W. Temple observes) is what the Romans themselves did, when they had occasion to import foreign names of places into their own Language. This Tully did, when he transplanted the Greek Philosophy to Rome; Xenophon, when he treated of Persian affairs; writers of the New Testament, in mentioning Roman places and customs: and, what is more to our purpose, when the Roman Law, on the removal of the Imperial Seat, was translated into Greek, Roman Terms of Art were chiefly preserved.

2. But the bare obsoleteness of Language, independent of Terms of Art, will alone make our Laws, or any ancient composition, unintelligible, barbarous and uncouth. It is the natural effect of time upon Language, as wrinkles are of age upon features. In Tully's days, the Laws of the Twelve Tables were become obsolete and obscure: and

Quintillian

Quintillian tells us, the "*Saliorum Carmina*," were grown mysterious to the priests themselves, who repeated them. And it can scarce be a wonder, that the French of Edw. I. time, in our old Statute Books, is unintelligible to any but Lawyers, even in passages excluding Terms of Art, when Scripture itself, if it was to be read before a country congregation in the first translation of the Bible, would be as little understood, as if it was read in Greek. One can not help wishing, in this view, that both our Laws and our public service of Religion had been earlier used to our own Language; since, besides by these means they would both have been more universally understood and admired; they would both at the same time have, in some measure, contributed to have fixed and preserved the Language.

And yet, how great soever the absurdity may seem, and how much soever to be lamented, that Laws which are made to be universally understood, have with us, for ages, been composed in Languages which, at most, none but learned men could understand, the fact itself does not seem difficult to account for.

During the unsettled times our country was long involved in, after the Conquest, the Language must necessarily have been in a fluctuating state. In the period preceding the Conquest, the various inundations of those Northern torrents, were enough to wash away the remains of the British Language. And the reason why the Norman and the Latin tongues were preferred to our own, for the purposes of Legislation, after the Conquest, seems to have been, that they were more settled, and, perhaps, almost as well known as what was left of the British. 1. As to the Latin, if you consider the intercourse our nation, for so long

long a time, had with the old Romans, and afterwards with the see of Rome; how the Canons and Constitutions of the Church were composed in that Language; and most probably public worship at home; it will be easy to account for the use of that Language in respect to Laws. As to what you observed, that even deeds and private instruments were likewise in Latin, which seems more unaccountable; perhaps it might have been, because so great a part of the lands were in the possession of the Church, which consisted of men of learning, who might prefer this to a living one: especially since the Statute of Edw. III. by which, as all Records were to be made up in Latin, it might be thought as well worth while to have them so at first; and then, in case they should be contested, less doubt could arise about the identity or meaning of the instruments in dispute. And 2. as to the use of the French, in conjunction with the Latin, and for a time, in exclusion of it, the continental connections, from the moment after the Conquest, would be alone sufficient to explain it, if we had not been told by historians, that the Conqueror used the utmost zeal and industry to propagate his own Norman tongue: and that too, in his particular case, from motives of sound policy and good sense.

These reasons, I think, may give light into a measure so seemingly repugnant to general principles of policy, considered independent of our history; but I own to you, I am greatly surprised, that from the time of Edw. III. when the Parliament so nobly checked the usurped dominion of the bastard French (as the Norman Language has been called) in our Records, that no successful effort should have been made, or seemingly have been wished for, to restore the Laws and all Legal Proceedings,

Proceedings, to the general Language of the Country, from the reign of Edw. III. to the beginning of the late reign; except the momentary usurpation of good sense, (as I may call it) in one of Cromwell's ordinances to this purpose: an ordinance founded on just notions, well considered at the time, and fit to have been retained in after-times. Pity indeed that the Language should have been, in any degree, sent into exile, just 'at the time when the legal Government was restored!

POLICRITES.

To tell you the truth, I have other objections to the style and phrase of our Profession, than what result merely from the use of the native or any other Language in its Proceedings. We are every day enlarging a collection of cant phrases, which can scarce be called Terms of Art, or, at least, are many of them of so modern a growth, that the absurdity is, in a great measure, that of these times, and I do not know where it will end. Such are your "springing, shifting, and resulting" "Uses, Executory Devices, Contingent and Cross" "Remainders," and many others less authorised that would confound Lord Coke himself: not to mention your use of fictions, in contradiction to the common sense of the World,—that the King never dies,—that the Term is one day, and such like. If these were introduced only for the love of mystery, or to amaze men with paradoxes, I could soon increase your collection. In the same equivocal sense, one might say with Swinburn, a mother is no kin to her child: or that there is at this day, no such thing as a religious man, or, indeed, as a villain in England. These *Jeu d'Esprits* would be full as manly as making "homo
" stand

“ stand for a woman, or mulier for a man, persons to be born to mean persons already born, persons living to mean those not born, a King to stand for a Queen, and even one particle to mean another.” But not to mention more of these, for these are trifles to much of the Language of special Pleading, so little known to any but the Professors themselves, that many would as soon expect to get its meaning by conjuration, as that Patriarch of Venice once attempted by a word of Aristotle’s.

E U N O M U S.

Several strokes of raillery you have aimed at the Profession, put me in mind of an anecdote I have met with in a book of travels; though, I am sure you do not mean to say so much. The story is not an unpleasant one, though you will own rather severe. St. Evona, a famous Lawyer of this Country, in the days of our early ancestors, was piqued, we are told, for the honour of the Robe, that his Profession should have no Saint to patronize it, when almost every other employment had some pious person, whose memory every one of the same way of life might revere, and under whose good auspices they might follow the same track. The Physicians, he knew, had St. Luke; the Champions had secured St. George to themselves; and Music and Painting were not without their Tutelar Saint: but the Lawyers he found had none. The Pope, he was bound, as a good Catholic, to think could help him out in this emergency; so to Rome the good old man went: and requested his Holiness to give the lawyers of Britain a Patron. The Pope was not displeased with the request; but puzzled how to grant it. The truth was,

was, however the Roman Calendar was stuffed at that, or in later times, he could recollect no Saint who was not already disposed of to other Professions. What could his Holiness do? The dilemma was distressing enough. Had he flatly told the old man, he could not assist him; the Pope would have owned then, what no Pope ever yet owned, his Incapacity: had he taken the other side of the alternative, and offered him a Saint for his Profession, who had already long been at the head of another; his Holiness foresaw our veteran Lawyer would have disputed with him the validity of a subsequent grant of the same thing, while a former was still in force elsewhere. Pressed by this difficulty, his Holiness acted like a good casuist: and thought of an expedient that might at once be a salvo jure of his good nature, his want of recollection, and the Papal power. He proposed to St. Evona, that he should go round the church of St. John de Lateran, blindfold, and after he had said so many Ave-Maria's, that the first Saint he laid hold of should be his Patron: which the good old Lawyer willingly undertook.—When he had finished his Ave-Maria's, (the Book says) he stopped short, laid his hands on the first image he came to, and cried out with Joy, “this is our Saint, let this be our Patron.” But when the bandage was taken from his eyes, what was his astonishment to find, that though he had stopped at St. Michael's altar, he had all the while laid hold, not of St. Michael, but of the figure under St. Michael's feet! The story says, he was so dejected at the disappointment, that he died soon after. And it seems to me still open for you to argue, whether Evona himself had any authority to act for his Profession? And whether he should be deemed to have ever accepted the Patron?

POLICRITES.

POLICRITES.

I shall scarce ever make a question of what I can never suppose. The Profession may safely disclaim such a Patron; I trust none of its members are bad enough to merit the imputation. But, if you would wish to answer my difficulties rather than desert me, with me it has always been difficult to understand, how Pleading is necessarily involved with such barbarous terms; and yet the art itself, so fenced by this inaccessible jargon, is dignified by nothing less than the name of science? Tho' I must not forget the Conveyancers, both artists often contributing to the glorious uncertainty of the Law. I do not know whether the blunders of the latter do not furnish the other with the best half of his business: "words of limitation and "words of purchase," it must be owned, have been very good Clients in Westminster-Hall; their pretensions are generally left so very vague and ill-defined, that one rarely knows in favour of which to decide. However, the Pleaders are obliged to them.

E U N O M U S.

They are very little obliged to you, I think, for so partial and unfair a representation. But instead of a flat denial, of all you have said, in common form, I am ready in contesting a point that has been so often perverted, fairly to take issue, and in the Language of those gentlemen, "to put myself on my Country."

POLICRITES.

"I do so likewise." But that you may not shorten your defence for want of a charge, I here declare,

declare, that I, and every man in England, do complain; that whereas, we are true, pious, faithful, and honest subjects of this kingdom; those dealers in form, do insert both for and against us so many false, scandalous, words, without a meaning, and with senseless repetitions to the damage of the said persons, very often of all they are worth. This is my *declaration*; and I give you leave beforehand, to plead as many several pleas to it as you will: for, I think, out of all together, you will scarce patch up a defence,

E U N O M U S,

You have expressed yourself rather in the style of an impeachment than a declaration, especially as all the people of England are made parties to your complaint. And yet I do not at all doubt, what you have probably condemned without much thinking, you will have candour enough to admire upon more solid reflection.

I observe your raillery, in the course of our conversation, has been often pointed at forms of Law: and special Pleading has, as it necessarily must have in that view, enjoyed a great share of that raillery, as you look on form to be of its essence. But because I aim at a more general defence, I will drop that particular for a few moments, after reminding you, that one of its ablest advocates is not blind to any real defects that have crept into it. Lord Coke himself often censures impertinent pleading. These censures do give some little weight to your complaint; especially as in these enlightened days, there has been even an address in Parliament against special Pleading itself.

Forms in Pleading, of some kind, necessarily succeeded the old way of defence, that was made

ore tenus at the Bar. In that case, the parties could best explain the nature and meaning of their defence; and the Court, in presence of the parties, could say, whether that defence ought to be allowed. That method of pleading personally at the Bar, is still retained, in a few instances; in the manner of suffering a common recovery, in counting on a Writ at a Serjeant's call, and in pleading to Indictments for crimes; and in Courts of Conscience, for the recovery of small debts. And though, in the general run of Civil Suits, it may, without examination, be thought the only remedy for dispatch of justice; it must, in most cases, and in an advanced State of Society, prove a great hindrance and disadvantage to the Suitors in other respects. For that reason, it will be rarely found to continue in causes of value, in any civilized country whatever. The instances of this kind, one reads of in the Turkish dominions, may please us that it is scarce to be met with elsewhere. The opposite practice, in most countries in Europe, and the elaborate forms, appropriated to particular cases, among the Greeks and Romans, shew the sense mankind have of the necessity of written forms of proceeding in the due administration of Civil Justice. Nobody, I imagine, every thing fairly considered, would wish to have this method of personal Pleading, recalled in England. And yet, it is very plain, some kind of form immediately came in the room of this manner of defence, as a means of checking the impertinence, and expence of telling long stories on Record, and of obtaining some kind of certainty in the grounds and meaning of the charge and defence set up. You will best understand what kind of forms are real and necessary, by considering the nature of the certainty the Law requires. This, I mentioned,

oned, will oblige me to depart a moment from the particular subject now under consideration.

It will appear, I apprehend, incontestibly clear throughout our books, that the Law requires less nicety and exactness in a man's last Will, than in a Conveyance: and less in a Conveyance than in Legal Proceedings. The reason of which I take to be; that at the time of making a Will, the parties understanding is sometimes presumed to be impaired, and they are obliged to act without proper assistance, And therefore, where there is power to come at the intention, Courts will do every thing they can to enforce it: because a person in his Will disposes of what is merely his own absolute exclusive property; or so far only as it is so. But in Deeds (which are solemn acts executed inter vivos) the Law will require a sufficient exactness; and legal powers to be expressed in proper legal phrase. Because they are supposed to be framed by the advice of Council: and it is necessary, if technical terms are made use of, to understand them in a fixed sense; it is necessary too, for the credit of the Law, in order to avoid bad precedents, to overturn such Deeds, as when contested appear to be informal and uncertain. But even here "*Apices Juris non sunt Jura*;" and Courts will not permit trifling Exceptions to avoid Deeds, because the party has no remedy to have new. With more reason, greater precision was of old required in Writs and still more in Pleadings. For Writs, if abated, may be supplied by new Writs; and for the credit of the Law, what is likely to become immutable as a Record; and as such, of that dignity as in point of obligation and interest to the parties, to take place of all instruments whatever; in point of precedent, to silence all mankind, ought in reason to be more exact than all other forms whatever.

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But even in Legal Proceedings, though they are, or are likely to become Records, Courts will distinguish between matters of an amicable, and an adversary nature; and will make some grains of allowance to the former, that they will refuse to the latter. Lord Coke, I think, has told us, that they will not "pry with Eagles eyes into assurances of the Realm;" that fines shall have such construction as Charters, or other Conveyances, between party and party; and need not have such a precise form as a Writ or a Judgment. From the same just principle of reasoning, is derived that stream of indulgence, that flows in the capacious channel of those statutes made to remove exceptions to pleadings, for want of form, where the want of form could be no possible prejudice to the matter in question.

After this short, but necessary digression, to shew what certainty the Law does, in general, require; I must now return to consider the particular kind of forms you, with a great part of the world on your side, have so freely censured.

I shall be always happy in endeavouring to vindicate any part of the English Law, which I adore, from any plausible imputations: and if it is really vulnerable in any part, perhaps it is principally in that you have now attacked. The few writers on Pleading, have never failed of making that passage of our master Littleton, to which you alluded, the motto of their performance: they with him, in their preface, call it a *Science*; but in their works (I allow) have either forgotten to treat it as such, or have most miserably mistaken the nature of science. I do consider it as a science; and in vindication of Littleton's notion, so grossly perverted, will give you my reasons why I think it so: but as your objection itself may be extended to other parts of our Law; I shall go rather further in my answer;

answer; by supposing, in order to prevent, such objections.

I shall take it for granted, that science and demonstration (which is the path to science) are not confined to mathematical learning only. They are to be found, wherever certainty in our ideas are: they are, therefore, to be had often in the study of Morality, and consequently in Law, which is founded on Morality. Demonstrations in Morality are not, in every instance, so absolute as in Geometry; because this depends on external figures, unalterable in their nature, and independent of the mind: whereas, the other depending on the mind, must depend on the clearness and precision of our ideas; which must be communicated by words. but will as often be entangled by them. Nor, when I speak of Morality or Law, as a science, can I be understood to mean, that all the truths they contain are so chained and connected together, as to be deduced from a single proposition, like those of Euclid: that is not necessary to Science. Morality has been so treated, you will remember, but by no means to its advantage. A chain of propositions is as disgusting on such subjects, as the forms of Lemmata, Postulata, and Corollaries, so idly used on such occasions. And Leibnitz, who would have deduced all we know in a direct line from "cogito ergo sum," was not, in my opinion, more ridiculous than these writers.

But Morality or Law are to be considered as *Sciences* in this respect: their principles are either self-evident truths, or immediately deducible from them; and we may reason in every case from those principles, with certainty, clearness, and precision.

Nor will it be any reply to what I have said, to ask me why, if Law is a science, does it at all admit of

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altercation;

altercation ; or is demonstration on one side set up against a pretended demonstration on the other, as in every case argued in Westminster-Hall? Why too, is truth itself engrafted on error? Why do Lawyers (as you have urged) use fictions themselves as principles ; and instead of building on self-evident truths, argue from the clearest falsehoods?

The answer to both these objections, is briefly this ; that they are both of them the common practice in other cases. But as to the first objection, the argument (if there is any) is drawn from the abuse, which, in sound Logic, you well know, concludes nothing against the thing itself.

1. In Morality as well as Law, interest will often get the better of reason : and men, who have a passion to indulge, or a right to dispute, will, when biased by interest, endeavour to maintain their ground against truth ; and keep up a colour of argument, though they argue from false principles. But then in neither instance is sophistry to be complimented with the name of demonstration ; neither Morality nor Law are to be degraded, because they are abused. Besides, as men in either case, are accountable to other tribunals than their own consciences, a disinterested decision, in either case, will set every thing right in the end ; will separate truth from fallacy, and restore Science to its basis.

2. Your other objection is more plausible, but proves too much. It proves, at least, that Lawyers may be excused in arguing from fictions, if in so doing they do no more than what Mathematicians themselves do. Those conversant in the higher Geometry, know what use are made of mere approximations, where the conclusions, though *ex vi termini*, not strictly true, are so near the truth, that

that they answer the same purpose. But to give an instance in Natural Philosophy, within every body's reach, do but, in *Prior's* Language,

————— cast your eye
At night upon a Winter's sky,

and then tell me, whether you see any of those bears, dogs, and serpents, so familiar to Astronomers? Every body sees the grossness of the fiction; and yet, you well know, how useful it is to Astronomers. Will you, after these bold assumptions, rob the Lawyers of a few innocent fictions? Or impute as a crime to one science, what has so nobly extended the boundaries of others? But the Law itself, in reality, is not answerable for all its fictions: we must distinguish. Some, indeed, are of its own creation; but others are the effect of time alone. To explain myself by some of your own instances: *that all lands are held of the King—that the King never dies—that the Term is but one day—that Jamaica*, or any other part of the world, *is said*, in a declaration, *to be in the county of Middlesex*—are merely notions of Law, and of the genuine essence of fiction. But the terms *Benefit of Clergy—incurring Premunires—the doctrine of Common Recoveries and Casual Ejectors*—though fictions now, were once correct expressions; are founded on former real practice; by course of time and accidents are greatly perverted from their original, but yet easily to be traced to a sound natural meaning.

If then, this answer to your objections is sufficient; and the notion, that the Law in general is a Science, is right; I will next consider, whether that branch of it that is conversant in pleading, has not the same pretension to science, that legal reasoning, in general, seems to have. And tho', on this occasion, I am council for Littleton, as well

as the Law; I desire Littleton himself may be heard: because I principally intend to shew the justness of his observation.

—" Know, my son, (says this great Sage in the " book before us) it is one of the most honourable, " laudable, and profitable things in our Law, to " have the science of well pleading in Actions real " and personal; and, therefore, I counsel thee especially to employ thy courage and care to learn " this."

Littleton's words are, in point of expression, too plain to need any comment; I will only enforce them, by observing, that the science he speaks of has, at this day, some additional recommendation to its " being honourable and profitable," that it is less troublesome than it was formerly: because, time has not only lopped off one of its branches, in the disuse of real actions; but improvements in the Law itself, have weeded it of many of those quirks and chicanery that disgraced this part of the Law, more than any other; and that so often in practice, set Littleton's epithets of " honourable" and " profitable," at variance with each other. Witness the Statute of Q. Anne, for the amendment of the Law: and a hundred others allowing the general issue, and special matter to be given in evidence.

By pleading, I shall understand the entire structure of a Record: comprehending as well the Plaintiff's demand, suited to the nature of the action and the circumstances of his case, as the proper answer of the Defendant to destroy that demand; with the subsequent steps arising from these, till the Record is brought to some issue, either of Law or Fact.

Now with reason and common sense for your guides, would not you, in framing any demand

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at Law, consider what is to be alledged, and what can be proved? For in suing either for a right detained, or a wrong committed, the Plaintiff is to recover by his own strength, and not by the Defendant's weakness. And if, in point of prudence as well as justice, he ought to demand no more than he can prove; in point of general convenience he ought to demand it, with that certainty and precision, (as to time, place, persons, &c.) that the Defendant may know how to answer the demand; and a third person, an entire stranger to both, sitting in a Court of Justice, may know how to judge between them. This, I take it, is the essence of a *declaration* in the abstract: it is common to every form; and without which no form of a declaration is perfect. And though the wisdom of the Law, has invented different forms of Actions for the recovery of different Rights; you will find, that the substantial part of any declaration, is, as to its great outlines, what any person of good sense would most probably put together in a demand of that nature.

POLICRITES,

But though declarations of Trover, Detinue, Trespass and Case, have each their proper forms; why, if your position is true, cannot a plain, just narrative of the circumstances of fact, be sufficient of itself; and the bare state of the case be its own form?

EUNOMUS,

I can only answer, that this might do very well for the few who are endued with uncommon good sense; but is not the easiest and most direct way
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for the generality of people, who would never be able to tell their own story on Record, in a small compass. I will add, that forms, of some sort, are the consequence of any thing becoming an Art: what do we mean by an Art, but a collection of certain rules for doing any thing in a set form? I will add too, that these forms are more concise and convenient in themselves, than any one general form can be. I beg you would remember, I am not shewing you the manner of pleading; but that pleading is a science: nor shall I, in any one instance, pretend to tell you what ought or ought not to be pleaded; but I am to maintain, that in any instance whatever, where the pleading is good, it is reducible to plain principles of common sense. This consideration, though it will not, in a moment, convey into your head all those forms, that nobody, I suppose, is born with, but acquires by long application and experience: yet will it teach you how to judge of those forms; how to examine the propriety of those exceptions, to be met within our Report-books, and the opinions given in those cases; in short, it will prevent your being misled by form in opposition to common sense, or without ever consulting it.

The Defendants plea or answer to the declaration, (which, though only one part of this branch of learning, has by accident given name to the whole) is the most difficult and complicated part. It must be grounded as well on the case the Plaintiff makes, as his own: and therefore, in the simplest view, a Defendant must either except to the manner in which the Plaintiff makes his demand, or he must answer it. Again, in answering, he must deny the fact alledged against him, or justify the doing it. To shew you this idea is not a refinement of modern Theory, I will appeal to
antient

antient Rome. Tully, in his Milo, you remember, seems to have considered this as the only method of treating a charge—*Vidit in confessione facti, juris tamen defensionem fuscipi posse*—and again, *Cum esset controversia nulla facti, juris tamen disceptationem esse voluit*.

POLICRITES.

That a person, when he is charged with having done any thing, must either deny or justify the fact; I readily grant: but your modern way of doing both, puzzles me extremely to account for. And it will be as easy for you to quote Tully in vindication of that method, as to make it science. Euclid often sets out with supposing, that a proposition is true or not true: but he never supposes both. The conduct of your pleaders in this case is, to me, worse than the most perfect scepticism. I know nothing that resembles it, but Mr. Bayes's dance in the Rehearsal. First his troops are dead; then they are not dead; then it is doubtful whether they are dead or not. An absurdity this, in point, to any common case, (of an assault and battery for instance,) where a Defendant first says, he did not do the fact charged; then he says, that he did it in his own defence.

And then, though I should admit the necessity of different forms in declarations, I have much to object to what you, no doubt, will call words of course, such as colour, inducement, and all that kind of ingenuity with which Pleadings varnish over the flaws of their manufactures. Why, for instance, because I have reflected on a person's character, and am sued for it, in an action for words, is he, at the very time he complains of such an injury, to do me (and what is more, to be authorised in point of form to do me) a much greater injury

injury in the same way? Why is he to represent me as one of a malicious, diabolical disposition, and intending totally to ruin him? Why, when another knows he ought only to alledge what he can prove, is it a necessary form for him to say, I beat him with sticks, knives, staves, and endangered his life; when, perhaps, if I did any thing, I only gave him a push? It is the doctrine of Pleading, that such things are not traversable, because immaterial: if they are immaterial, for that reason they ought not to be alledged. As for the giving colour to Pleadings; it is what has frightened some from the Profession itself; I need not add, it is enough to discredit the Profession in the opinion of others.

E U N O M U S.

I must again repeat, I neither proposed to teach the rules of Pleading, much less to vindicate the real imperfections, and abuse of it. It is not a reflection on the soil itself that weeds grow up with the fruit: it is on those who neglect its cultivation. Most of your objections are old, and carry with them the marks of decay, as well as of age. There is less room for them now than ever: at least, I will maintain, Pleading was never treated more as a science, than it now is from the Bench; and that in its consequence must make it be so at the Bar. The more strict the assay is likely to be, the purer will the coin be sent from the Mint. And in fact the special Pleaders are not now the recluse beings that you supposed them, in the beginning of our conversation, "people who furnish the language of courts without ever being seen there themselves:" but many of them, men of the first abilities and most extensive practice; who, if
their

their inclinations or other engagements to the public would permit, might introduce their own science into the world in a manner that should satisfy every friend to solid learning, and silence every cavil and objection.

But as we are yet to look for any work of that kind upon this subject, I will endeavour to relieve you at present by observing, that as to the goodness of pleading, this science, like every other, has its axioms; certain established maxims, which influence the whole, and with which all parts of the system must be consistent.

A Declaration, in general, we may venture to say, will be good, if the Demand itself is well grounded, the form of Action rightly chosen, and the circumstances of the Case expressed with sufficient clearness and certainty. A Plea, in general, will be good, if it is a certain Legal Answer to the Declaration.

To be more particular: the first fault in Pleadings is fatal; and the declaration is the ground of the whole. So that, if the demand itself is faulty, though the Plea is equally so, the Plaintiff must in reason be the loser: for no matter what is the weakness of a fortress to those who are still too weak to attack it.

To have the demand unexceptionable, there must be a legal right of action, and the proper course of remedy. The case must be expressed with perspicuity and precision: and hence the necessity of many Counts or different ways of laying the case in a Declaration. Hence, too, matters of inducement are laid; it is a general rule, these are not traversable, because they are not material to maintain the charge, but to inform the Court how the demand arose. For this reason, they need not be averred; but every thing material to be answered, ought to be averred.

Then,

Then, as to the Plea, (considered, I mean, at present, as an answer, not as an exception, to the Declaration) it must be either a direct denial, or a direct excuse. Considered as a denial, it must not set out matters which do, in effect, amount to the general issue, but must set out the general issue itself: for every body sees, the latter brings the Record to the very point at once, which, after all, in the other case it may come to, though, possibly, not till it has been swelled and entangled with Replications, Rejoinders and Surrejoinders. A Plea must not contain matter of argument or inference, but a positive assertion. It must not contain departures; or traverse what is not alleged in the Declaration. It must not be double, but rest on one simple point of defence. A Defendant, at this day, by leave of the Court where the Cause is depending, may plead several matters in his Defence, but not make a Plea double. The antient way, still used in many cases, to avoid duplicity in a Plea, is, first, to protest any matters charged are not true; and if true, by way of Plea, to justify. This form of Pleading admits, you see, of but one distinct issue; either upon a protestation or the Plea. After all, when the contents of the Plea are settled, it must be right in its conclusion; that is, in proceedings, by original writ, it must, as the case requires, conclude, either to the Writ or the Declaration: and in this sense only, I take it, is to be understood the maxim, that the conclusion defines the nature of the Plea. And in every case a Plea must conclude, either to the Court or the Country, as the matter contained in it is properly cognisable by the Court or a Jury; and, therefore, tends towards a demurrer or an issue of fact. If I am not perfectly intelligible to you, or have been under mistakes myself in what I have advanced, as there is too much reason to fear, I hope the difficulty of the subject will excuse me.

The structure of a Record, raised on these foundations, is not less solid than the demonstration of a proposition in Euclid: and Pleading, formed on these maxims, is not only matter of *science*, but, perhaps, affords some of the best specimens of strict, genuine Logic.

I know it is the want of adhering to these maxims, that will, after all, be urged by men of sense, as the great objection to special Pleading. A navigation, often difficult in itself, and always made dangerous by bad pilots, has made many wish that the course of the voyage was entirely changed! This view, probably, induced the Legislature to authorise the general issue in many cases, and permit the special matter to be given in evidence. The same view, probably, occasioned an application to the Legislature, at the time one great reformation in the Law was made by putting Pleadings into English, to abolish, at one stroke, all special Pleading whatever. That part of the petition, we know, was barely left to stand on the Journals, and never was made part of the Law.

Others have wished to compass the same end, but to obtain it by different means: to have the advantage of the general issue in all cases; but in all cases to have a note of the true point, meant to be insisted on at the trial, given to the other party or his attorney; to have that very point found interms by the Jury; to have it endorsed on the Postea; and Judgment given on the point. This method, it has been thought, would be sufficient to prevent surprize on either side; would prevent, at the same time, all the inconveniences arising from the intricacies of Pleading, and yet make the Record particular enough, to set up one verdict, unimpeached, as a bar to another trial on the same case. I shall only observe, as to the method itself; that there is something analogous to it already subsisting in practice, in the case
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of an indictment for Barretry : which offence consisting of divers acts, in disturbance of the common peace, a general charge is allowed to be sufficient on the indictment ; and in lieu of the particularity so favourable to the Defendant, and on that account, that he may not be surpris'd, so agreeable to the general policy of the Law, a note of the particular matters intended to be proved is given to the Defendant at a convenient distance of time before the trial.

But whether special Pleading would, in point of saving time or expence, be better reduced or not ; or whether this method would be effectual or not, are points, about which, I take not upon me even to hint an opinion. I am content to insist, that Pleading is, in its own nature, *silence* : and that in all cases, where the skill of the draughtsman itself is not deficient, the outlines may be truly and regularly drawn.

Thus, my Friend, have I presumed to vindicate this copious and difficult subject from those imputations, which I shall not scruple, now, to call, rather the cavils of prejudice, than the attacks of truth. If it really wanted defence, I am conscious, it must have looked for it elsewhere ; I am too little versed in the excellencies of the art, to have set it in a fair and proper light ; and yet too well affected to the Law in general, to suffer raillery to pass for argument, and the honours of a victory, to be assumed without even the merit of an engagement. Am I to infer, from your silence, that your attention is only wearied, or that your objections are, at last, exhausted ? However, I think it high time to know your mind, and I will call upon you in the words of the Poet.

—— dede manus ; si non, accingere contrá.

POLICRITES.

POLICRITES.

§. 7. A compleat surrender, I fear, you must not expect; I am so far aware of your strength, that I think it good generalship to reserve my fire; and permit you to flatter yourself, that you have silenced the battery in that quarter, that I may open it with more success in another.

And besides, many of the objections, laying as strong against the forms of Conveyancing, as against those of Pleading, and which, therefore, I shall not repeat; the former has enough of its own, attended too with more fatal consequence in this case, than in the other; and of a more extensive, as well as more pernicious influence. Very few, in a society, (comparatively speaking) persecute their species, or are persecuted in Courts of Justice: consequently, few suffer by Nonsuits, Demurrers, and Arrests of Judgment. But every one, in his turn, that has any property at all, buys or transfers an estate, marries and dies. And, therefore, every one in his turn, either in himself or his posterity, may be a victim to the Conveyancer: as he may be harassed by his Deeds of Purchase, his Will, or his Settlements. And yet, here, I suppose, Practice is to be dignified, at least, with the name of an Art, as before it was called a Science: as I shall, doubtless, be told one has its Rules as well as the other its Principles. And one of its rules, no doubt, is to be as prolix, and full of tautology as possible. The credit of which observation I, by no means, take to myself: it has been made, at least, a century ago; but, I suppose, does not lose strength at this day. One of our Legal Antiquarians, I remember, in a kind of funeral Eulogium on the Saxon simplicity, so long since dead, observed,

observed, that even in his time “*an acre of Land could not pass without almost an acre of Parchment.*” He would have observed at this day, that a flock of sheep is often converted into a Settlement. Virgil’s Carthaginian Queen was immoderate as well as fraudulent, in cutting the thongs into parchment, to inclose the purchase*. Our moderns are rather more moderate, as they seem sometimes to bargain for no more land than they can cover with the uncut parchment that conveys it. If Somner, however, a grave antiquary, could indulge in the observation just mentioned, we may easily forgive the comic humour of the Poet, who makes Hamlet remark, “that the very Conveyances of a man’s Land would hardly lie in his coffin:” and if all this mass of verbosity shrinks, at last, to little or no meaning, I may well continue and apply the dialogue of Hamlet and Horatio, to our present subject.

HAM. Is not parchment made of sheep-skins?

HOR. Ay, my Lord, and of calve-skins too.

HAM. They are sheep and calves that seek out assurance in that.

E U N O M U S.

§. 8. I fear no human ties will give the “assurance” you seem to expect. In vain do we blame Civil Contracts for the want of a Security, which is scarce to be had from Laws themselves. The adequate compliance with a Law, or the performance of a Contract, must stand a little indebted to

* Alluding to the tradition hinted at in these lines:

Mercatique solum, facti de nomine Byrsam,
Taurino quantum possent circumdare tergo.

Æn. I. v. 371.

moral

moral honesty ; or the penalties will not protect the one, much less will the parchment the other. And though, in many cases, there is no intention to evade either a Law or a Contract, there may yet be a difficulty to understand them ; a difficulty in both, arising from the unavoidable ambiguity of Language : and in Conveyances, very often increased by the circumstances and condition of the Parties. Your objection, therefore, (to treat it seriously as you began) proves a great deal too much : it is, in some measure, founded on the imperfection of human nature ; which, surely, will affect and perplex other human Acts, as well as Conveyancing. But this unavoidable obscurity, which is imputed to Conveyancing as one defect, is, in reality, the cause, and, I may say, the parent of the other : Deeds are, therefore, made prolix that they may not be obscure. The verbosity you complain of, arises from the anxiety of the Parties, that their meaning may be fully expressed ; that as little as possible may be left to refined construction ; and no loop-hole for evasion. And thus, in the common comparison of words to the leaves of trees, though thick leaves do shade the fruit too much from the sun, yet they, at the same time, defend it from blights. I do not, however, pretend to insinuate, that the length of Conveyances, is not often unwarrantably licentious ; I only mean to answer in general, what you object in general. And it will strengthen this answer, as well as meet with another part of your objection, that flows from a comparison of the present age, with those far back, if we are a little more particular on this subject. The subject itself is indeed very extensive : and you did not greatly exaggerate, when you said, every body made a Purchase, a Will, or a Settlement. As all property may be conveyed, it
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is evident modes of Conveyancing must depend on the nature and modes of Property, and are co-extensive with them. I will, therefore, very slightly, consider the subject in this order. First, I will attempt a short history and general sketch of Property in its several successive stages, comprehending some of its latest regulations by Law. I will next consider the alterations in Conveyances, depending on the state and alterations of Property. After which it will be necessary to deduce the alterations in Conveyancing, introduced by Law; and, very shortly, to observe what are the now great prevailing modes of Conveyancing. Lastly, I shall enquire, whence arises the confusion in forms of Conveyancing. In going through all this, the least I can do to reward your patience, is to give you free liberty to interrupt me as often as you please, to start your objections, and make your replies.

POLICRITES.

I wish you may not repent of your concession: however, the vast tract of time you are about to comprehend will be my apology.

EUNOMUS.

I shall not scruple to set out so far in your favour as to take the subject up no higher than the Conquest: and even for a long while after, we are too destitute of particulars to be at all nice in fixing dates or distinguishing periods. It is sufficiently evident upon the least recollection, and I will venture to assume it as an axiom, that for many ages, "the property of the whole kingdom was comparatively very small in itself, and in very few hands." The riches of the nation arose almost entirely
within

within itself; and England, considered as a reservoir, was, with respect to its foreign engagements, rather emptied than supplied from other quarters: for Wars were attended rather with expence than plunder. And the other great external resource to a kingdom, that of Trade, for a long time did hardly exist. The Riches of this Country, at the times we allude to, arose principally from the produce of its Land. And from the great and even disproportionate tracts of Moors, Heath, and uncultivated Land that we see even at this day, we may reasonably infer an infinitely greater formerly; when the Forests Laws prevailed and engrossed so much of the surface: when the rest of the surface was employed only according to the mean state of Agriculture in those days. And then in how few hands was even this property? The Church (comprehending the monasteries) we are told had about a third part of it; and the rest was parcelled out, according to the military idea of those times, among the great feudal Lords, who by their immense accumulation of property were only enabled to rebel against their Sovereign and impoverish their fellow-subjects: for the Public, comprehending the Bulk of the People, exclusive of the Church and the Nobility, were either Mechanics and Artisans, that from the nature of their trades and their tenure must have lived from hand to mouth; or Feudal Tenants in the melancholy series of Vassalage down to perfect Villainage. Nothing can take off from the deformity of this prospect, but the faintness it acquires from the distance at which we now view it. If you would at once change the scene, and as it were contemplate day-light without observing those intermediate diminutions of shade by which it is gradually separated from darkness; we must at least pass on

to the reign of Henry VII. if not to that of Elizabeth, before we can have any comfortable view of the Arts, Commerce and Riches of the Kingdom. We shall then find a vast increase as well as a diffusion of Property : it was then principally that England was connected with and began to be supplied from every part of the habitable globe : it was then that every individual was enabled by his own industry to acquire property, fixed in its nature, and free in its disposal. It is enough, in speaking to one not a Stranger to the Law and History of his Country, to refer, in proof of what I advance, to the great Construction on the Statute of Intails, the Dissolution of Monasteries, and the Statute of Wills. All these concurred to open a free Alienation of Property ; as Commerce and the Discoveries which it produced, did to increase it. Not that, I think, the political basis was broad enough to raise the importance and riches of this Country to its just and full grandeur, till a greater increase of Commerce served to animate the Spirit of the Times ; and at the same time that it increased the Riches of England, made the Riches of England in a manner those of the rest of Europe.

When from that time to the present you glance ever so lightly back on the abolition of the military tenures with all their train of services ; the new species of Taxation that sprung up out of their ashes ; the introduction of public funds that took its rise from the emergency of the public, and that in its consequence has produced, and will necessitate the continuance of other funds ; though let me observe a wise minister to keep this flame alive now and then snuffs the wick instead of perpetually demanding oil ; prudently reduces the debt in order to preserve the credit. Add likewise the establishment of the Bank and commercial

cial companies; the ingenious, and to certain limits, useful substitution of paper currency for cash; the analogy that inland Bills have been made to bear to foreign Bills of Exchange in their negotiability and legal protection; and the coincidence of all these in forming a new species of property; when I say you have surveyed all these in your mind, you will have before you a sketch extensive enough for our present purpose, of the general State of Property; from whence you will collect, that it has been in the course of time more widely diffused, as well as prodigiously increased, as to the modes and quantity of it.

Its having subsisted in so many new modes, and its being so widely diffused, are circumstances that directly lead us to the consideration of Conveyancing. The forms used in early times, you will remember, were few and simple: for which it will be sufficient to have recourse to *West*, *Madox*, and some other compilers of antient Precedents; though the Draughts in those Collections, I own, are on so small a Scale, that those of later ages will appear too large and disproportionate: but I leave you to your own reflections on that head, and will go on as I proposed.

§. 12. And in order to keep within moderate bounds on so large a subject, let us distinguish as well as define.

By Conveyances, I would be understood to mean at present, written Instruments of private Persons, disposing of Property. This seems the most extensive notion of the subject: it has on the other hand its own limits, and even those must be reduced in this Enquiry.

It is obvious from this definition, that there are numberless written Instruments that by no means fall under the notion of Conveyances.—Such are

Certificates, Rules or Orders of Courts, Writs and Commissions, and various other Public Acts. These are all written Instruments; but they are neither Instruments of private Persons, nor do they dispose of Property. There are likewise other written Instruments which are in part included in the definition; and have a necessary relation to Conveyances. They do dispose of Property, but they are not acts merely of private Persons. They are not therefore in the present notion Conveyances; nor indeed in legal parlance have they been deemed so, but are called "Assurances of the Realm." They are Acts of Court as well as Acts of the Parties: or rather Acts of Court intended to supply the defects, strengthen the operation, and preserve the memory of what are in their own nature mere Acts of the Party. Such are some private Acts of Parliament, Fines and Recoveries. All which it is sufficient only to mention; their not being in themselves properly Conveyances will warrant our dismissing them at present.

By this definition too I would be understood to include a Devise or Will as species of Conveyances; though I know in common propriety a Will and a Devise are not only with respect to the different nature of the property they dispose of distinguished from each other, but as acts that do not operate till he that made them ceases to exist, are always in treating regularly on such subjects opposed in a strict sense to Conveyances. But so general a view as we are about to take will not endure this precision. They are both written instruments of private persons disposing of Property, they are both therefore Conveyances within the very letter of the present definition.

§. 13. Change of Property seems very early to have been accompanied with some written evidence

to substantiate the transfer. The superior use of written agreements to those made only by word of mouth arises from writing being in its nature better able to keep in the memory of the parties themselves the particulars of their agreements; and from its affording the best evidence for others to judge of the right of Property in case the claim should be contested; or where those who were privy to the making the agreement are not to be had.

No doubt of it the parole transfer was the original form of alienation; as it is easy to suppose the notion of Property, and the variations incident to it, to have been much earlier than the date of letters. The purchase of Sarah's Burying-place, in the twenty-third chapter of Genesis, is a very early and beautiful instance of the simplicity of the primitive times. And the great weight our Saxon Ancestors attributed to simple livery is better known to us than their forms of Conveyances. To this day indeed, in many instances, the greatest interest in lands may be passed by mere livery and seisin. But those changes of property are necessary objects of Conveyancing where there is nothing for a corporeal investiture to attach upon; or, in other words, and more artificial language, what "does not lie in livery must lie in grant."

§. 14. Should you ask me concerning the nature of particular forms, as well as of the several kinds of Conveyances, their history and their origin; the dread of prolixity would make me rather prefer the risk of being obscure to be sure of being concise. This consideration makes me gladly pass over the general or accidental structure of the deeds I am after to mention; with the various forms of dating, executing, and attesting.

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I set out with observing, that the alterations of forms in Conveyancing have depended much on the various alterations of Property itself: but alterations of the modes of Conveyancing have been introduced independent of new modes of Property: and this either 1st by Laws introducing new forms—as Bargain and Sale enrolled—Covenants to stand seized to uses—Assignments under the Bankrupt Laws, &c. or 2. by Laws requiring new circumstances affecting forms that had a prior existence: such as the attestation of Wills—and the influence of Stamp Acts upon Conveyances in general.

§. 15. The forms of Conveyancing that prevail at this day are but few: but even these as to their origin I think stand in no very favourable light. For I shall not scruple to say, much of the Conveyancing now in force was originally the offspring of fraud and evasion.

A certain mixture of pride and indolence (the former being the consequence of riches having produced power; the latter employing power alone to increase the fund instead of the industry that first raised it), have in all times of our history made men affect a fondness for *Perpetuities*; and labour with anxiety to introduce and protect them. And this will appear to have been the case, both as to individuals, who by means of great estates have necessarily been as great in power: and in bodies of men, who being possessed of great stock in common among one another have as naturally aimed at getting as much as they could into their own hands, and consequently taking it out of those of the Public. Had these attempts succeeded, you see by confining Property, the current of Conveyancing at length would have been stopped. And yet it is evident this art must have been ministerial for
a time,

a time, though it was in consequence of the success of its service to have been discharged for ever. And this we shall find to be the truth.

The individuals who have made the greatest efforts towards Perpetuities were the Feudal Barons of old. The Statute de donis in a manner created Perpetuities : for the books often speak of Estates Tail as they may by possibility last for ever. The Statute de donis Lord Coke expressly says, established a Perpetuity for all who had or would make it ; by force whereof (he adds) all the Estates in England were entailed. It was high time, you will say, when we come to reflect on the inconveniences of such estates, that the Nation should be in some measure alarmed at the consequences, and check them in their birth. This they attempted to do it seems by divers bills brought into Parliament to restrain Estates Tail. But who could suppose the Barons (as it were by an Act of Suicide) would vote against themselves ? It is much easier to imagine, what Lord Coke tells us was the case, that these bills were always rejected. And in this manner Perpetuities continued for 200 years, till the Common Law in a manner was roused from its lethargy ; and the Judges found that they could effect, by construction of a Law in being, what had in vain been attempted by particular Laws framed for the purpose, And in the ever memorable period of 12 Ed. 4, the Judges resolved, that by a Common Recovery the Estate Tail might be barred. Westminster-Hall has ever since maintained its ground, and routed even the most circuitous attempts to restrain Recoveries in favour of Alienations. This was the greatest effort that ever was made by individuals to introduce Perpetuities. The new-fangled doctrine of Trust-Terms has now and then furnished ingenious men with opportunities

opportunities of contriving settlements that look'd this way; but the Courts have been always too much on their guard to let them prevail. And from the Will of the Duke of Norfolk, to that of the late famous Duke, however the subtilty of human wit has been exerted in this field of ingenuity; good policy so materially affected by it has always got the better in the end.

But the other species of Perpetuities I alluded to, aimed at by bodies of men, has not only been checked, but good has been made to arise out of evil. And that stream, which had it been suffered to be dammed up, would have deluged part of the Land, while it deserted the rest, by the Law providentially forcing it a channel, became the cause of general fertility. It is to the attempts however of this latter kind that we owe much of our modern system of Conveyancing.

The alienations in Mortmain, Lord Coke shews, in the progress of its refinement, introduced leases for long terms of years: which till the time of Ed. I. were very short, and of no consideration. And it is in this view only that we can account for leasehold interests being so long incapable of giving the legal qualifications in various instances, they have since been allowed to impart. It is now every day's practice (however a plain man may laugh at it) for creatures, whose being is as a span, to talk in their writings "of a thousand years as of one day."

The same views of Mortmain shewed the way to collusive fictitious Recoveries under a pretended title. It was this armour, forged by fraud, that has in the hands of the Law been so powerfully turned against fraud itself; and been happily found, as I have mentioned, to be the effectual way of preventing the other kind of Perpetuity, tho' it was designed to strengthen the Perpetuities in Mortmain.

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The same views of Mortmain too first devised Conveyances to uses. Those uses which afterwards grew up and spread so wide during the contest of the Houses of York and Lancaster ; which were at length modelled by the famous Statute ; and were the origin of our modern Jointures. From these uses likewise sprung the doctrine of Trusts ; which at first (and in the Statute I speak of) were distinguished from uses in name only : and now are nothing more than uses not executed by the Statute, as Uses are Trusts within them. The Statute mentions them both as synonymous : only as the provisions of the Statute were not co-extensive with the practice that had been connived at long before ; such *Uses* as were not provided for by the Statute were left to their former channel of jurisdiction ; and became distinguished by the name of *Trusts*. And these Trusts are still one of the principal objects, as they were originally the cause of establishing the great Court that has the exclusive cognizance of them.

The introduction and progress of Uses, besides being thus the means of forming a fair and solid union between Law and Conscience, in making the latter supply the rigour arising from the precision of the other, till both compleated the true line of Justice, and the real intention of the parties in their agreements, contributed very much in the end to the improvement of the Law itself. For the many successful attempts of disposing to a use in the party's life-time of all future profits of lands, when he could not dispose of the lands themselves by any act to be in force after his death, probably opened the way much easier to the introduction of Wills themselves : though, as I have more than once hinted, the wealth and freedom of the times were sufficiently ripe for this mode of alienation, some time before it was established by Law.

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From the premises I have now laid before you, it is not too much to conclude, what was assumed in the observation, that the spirit of innovation, and even of fraud, have in the end been the parents of public utility. And later times that have adopted these inventions as a regular part of their system, may even now commend the Authors, as the Rich Man in the Gospel *did his unjust Steward, because he acted wisely*; that is, because the policy of his conduct was in conformity to his principle, bad as his principle was in itself: but the prostitution of abilities to evade the Laws of one's Country, however ingenious and subtle the means are, no good man will even think of commending.

§. 16. After this excursion into the origin of so large a part of our present system, a minute detail of the lesser parts would be less excusable; indeed the anecdotes themselves are few and thinly scattered in our books. It is said, if I recollect, that Executory Devises, for instance, came in about Queen Elizabeth's time: perhaps it is more correct to say the legal toleration of them began about that time; for though they have a small tendency to perpetuity, and are destitute of that certainty of Interest the Law has required in passing Estates; yet they had obtained in so many instances, and the real inconveniencies were found comparatively so few to what the overturning so many Wills in opposition to this practice would have produced, that it seemed necessary to admit of them to a certain limited degree. Not but that this form, which an indulgent admission meant as a kind of boom cross a harbour, to preserve the vessels already lodged there, has by its dangerous structure in many instances, prevented others from ever arriving there, and has often overset the Testator's intention, it was contrived to preserve. Sir Orlando Brydgeman

Brydgeman and Sir Francis North, we are told, were the Patrons and Founders of a very useful expedient in all Family Settlements, that of Trustees to *preserve contingent Remainders*. And the Books have handed down Sir Francis Moore, who flourished about the middle of King James's Reign, as the first practiser of a form of Conveyance, which has now almost absorbed every other as a substantive form, that of *Lease and Release*.

Particulars of this kind, if they could be traced with certainty, would neither be unentertaining nor perhaps useless in practice: they would at least be the means of giving due honour to the Authors of useful inventions; and so far would be a valuable part of legal history.

§. 17. The present modes of Conveyancing that principally prevail, I said, were few; I can recollect but five at all in use. I mean the simple original Conveyances: the rest being either derivative or collateral; or combinations of both kinds of Instruments in one Deed.

The Conveyances of the simple kind are Feoffment, Bargain and Sale, Grant, Lease, (to which we may add the Release, because it is, in fact, the principal mode of original Conveyances, though in its nature dependent on the Lease, but both Lease and Release taken together make but one Conveyance) and lastly, a Will or Devise.

By derivative Conveyances, I mean such as are strictly in their nature dependent on one of these principal original Conveyances; and either defeat, confirm, alter, or enlarge the interest formerly passed by them. Of this kind are Deeds of Confirmation, Surrender, Revocation, Defeasance, Assignment, and the like.

The complicated Conveyances of chief note, and which may occasionally comprehend by recital all others,

others, are a Marriage Settlement and a Will. Indeed as they respect the two great periods in human affairs, in which the whole of a man's effects are necessarily brought within his contemplation; it is no wonder they are in themselves of a complex nature, as they must often exhibit a review of so many former acts concerning the disposition of his Property; and at the same time look forward so far as in a great measure to influence the state of it for the future.

By the former a man is as it were to endow the family, in prospect of forming which he is induced to marry.

By the latter he is in prospect of leaving this world, to provide for those he would substitute here in his room as to the enjoyment of his Property: and to make an entire and complete disposal of it. It is impossible not to recollect upon this occasion the excellent advice of Lord Coke, which therefore I need not repeat: was it followed, it would most likely prevent half the disputes that have arisen upon this subject.

Neither of these are Common Law Conveyances; and but of late years (within a century I think) come to that size we now see them; particularly the former, which of all others best warrants the severity of your ridicule.

For as to Wills, the Antients seem to have been not much less prolix than we are at present. I remember to have met with an old Greek Will of Theophrastus the Philosopher, curious indeed as to its preamble, attestation, and many other circumstances: but, at the same time, perhaps one of the strongest instances now remaining to justify the imputation of loquacity Tully has fixed on the Greeks.

§. 18. The confusion and uncertainty you complain of in Conveyances does not arise so much from length as from other circumstances. Principally I think, 1. from the use of ill-defined words, and affectation of unusual clauses. The policy of the Law itself has in many cases, as well as in Conveyances, guarded against this uncertainty by requiring in some cases the insertion of the technical word that is to denote the particular act in contemplation ; and by allowing in those cases no substitution of paraphrase or explanation. Thus in Indictments for particular crimes, the words Murder, Burglary, Rape, can be supplied by no circumlocution whatever. And thus in particular Conveyances, the words Exchange, Bargained, Sold, and Warrant, are equally necessary.

But the cases where this exactness is required are few ; and it is no balance for the want of exactness in other respects in those very cases. The defect arises from a higher source. Lord Coke was in his time aware of it, and has pointed out the cause, and thereby the remedy. He tells us, Conveyances and Wills are absurdly and intricately made, because they are intrusted to "Imperities." And yet in his time, when the Law was so much a stranger to our language, Quacks in Pleading and Conveyancing could be but few in comparison.

2. But Conveyances and Wills have now and then, it must be owned, split upon another rock ; when no ignorance of the Law could have been imputed to the makers of them, but on the contrary too much ingenuity ; when they have attempted what the Law will not allow. As was the case of the Perpetuities, concerning which we have talked so much.

POLICRITES.

POLICRITES.

§. 19. And now you have once more mentioned them, let us have a word of the reasons for which the Law entertains this abhorrence of Perpetuities. What is there of such policy in the Law so anxiously restraining the natural wishes of mankind from doing by their own acts, what even the Law itself would in some measure do for them if it was left to the course and operation of Law? The Law by a regular uninterrupted course of descent would transmit a Man's Estate down to his remotest heir at ever so great a distance: nay, a Man may grant his Estate to another and *his heirs for ever*. Or after all the various intermediate interests in an estate, created for thousands of years, or after vesting an estate by so many limitations in Tail, a Man may reserve the same estate to his own right heirs *for ever*? All this the Law confessedly allows: and what are views of Perpetuity, a common understanding would naturally ask, if these are not?

E U N O M U S.

You do not want to be informed, that though by descent an estate may be continued lineally to the heir of any given Proprietor to the remotest distance; or though the Proprietor may do that himself which (you say) the Law would do for him; or by parity of reason may upon good consideration convey as remote an interest to the heir of a stranger; yet in none of these cases, will the estate necessarily be so continued: nor indeed in the common course of things is it ever likely to reach any very remote period. When the Law continues an estate to a man by descent, the disposal

sal of it by him is as free as the possession: and though the same descent would by notion of Law, and operation of the Grant, carry it down to his heirs for ever, he may the moment he is in possession defeat the hopes of all that come after him as to this estate. And when I give an estate to a man and his heirs for ever, his disposal of it to another is as free and open as mine was to him.

It is the attempt to confine this disposal, to render an estate *perpetually unalienable*, or unalienable for a time, that the Law will not allow it to be tied up from alienation, that is the Perpetuity which the Law abhors. This, I said, would have been the consequence of a strict adherence to the Statute de donis, with regard to individuals; and of Gifts in Mortmain to Bodies Politic. This would in a less degree too have been the consequence of some modern subtleties in the moulding of Trust Terms. All these attempts therefore the Law has wisely defeated. The reasons of the abhorrence the Law has always had to them can never be a secret, if you do but consider, 1. That they are absolutely inconsistent with the temper of a free Government, by lodging too much power in a few individuals.

In the feudal times they had other inconveniences which do not now subsist, such as depriving the Lords of their perquisites.

2. But more particularly, (because this inconvenience would be more soon and generally felt) they would be a bar to Industry and Commerce; the Cultivation of Land; and the Improvement of Estates: to which I need not say a freedom of charging or conveying Property is absolutely necessary.

§. 20. The Common Law then has a very just political abhorrence of Perpetuities, or any restraints

straints of Property, that are unfit for the genius of a free and commercial Country.

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May it not however be thought, that the freedom of alienation itself is in some cases excessive; and that political views do, in some instances, stand in the light of moral duties?

It may be said, by the Power of making a Devise or Will, a person may leave his whole family destitute, and the Law cannot controul it. The Wife, it must be owned, is in this case better secured at all events than the Children; the provision of Dower at Common Law, where she has not barred it by accepting a Jointure before marriage, will controul any Devise whatever as an antecedent claim: but a Man may leave all he has from all or any of his Children, and his Children may be without remedy.

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The just answer to this barely possible inconvenience is, that in considerable fortunes, where the inconvenience would pinch most, it will be less likely to happen, the Children being generally provided for by Settlement, besides the chance they have under a will. And as to the power itself of disposing by Wills, it is what all countries in the world have ever adopted; and as Laws are not made against monsters, few States have supposed that Parents would be so unnatural as to make use of this power in prejudice to their Children, and therefore have made no provision against it. *Ad ea quæ frequentius accidunt, Jura adaptantur.*

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And this reasoning will be an answer to another case, which may be more likely to happen, and that too perhaps without any bad intention of the Parents; and yet be equally severe in its consequences. This inconvenience may result from the mere act of the Law, even against the presumed intention of the Party. A man may die seized of an immense real estate, and perhaps hardly any personal estate, or at least not enough to discharge his debts: suppose that he leaves many children totally unprovided for by settlement, and that he dies intestate, the eldest son in that case, his heir at law, sweeps away his whole estate; his other children are, as the Law stands, not entitled to a farthing, and have nothing to rely on but the beneficence of their brother. This case in all its circumstances will rarely happen; the blame, when it does happen, must be laid in the first instance to the feudal course of descent, which, being once established, necessarily occasioned the possibility of this and other hardships, in all places where the customary power of devising was not preserved: it subverted that of the Common Law, which favoured an equal distribution. Many States indeed have invested primogeniture with a larger proportion, the feudal alone gave it an entire preference: and yet most writers have considered this preference as strictly in conformity to feudal principles, and necessary at a time when rules of landed property were to be calculated with a view to the military genius of the times; and when war was not, as in more civilized ages, carried on merely for the security of property. When the feudal system wore away by degrees, the power of disposing by Will was re-established: and that in most cases is a balance to the inconveniencies arising from the course of descent; especially if we take in

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the additional security most families have in the settlements made at the time they are first formed. This, in general, will be a match for the accidental omissions or inequalities of a Will; much more for the uncommon chance of an intestacy that is to operate merely on a real estate.

The Law then does not deserve to be arraigned either for its too great indulgence or restraint of alienation: and as to the uncertainty complained of in the forms of alienation, the cause of those defects has in some measure been pointed out.

§. 21. But as some kind of balance to the unavoidable as well as artificial uncertainty of language, the Courts of Justice have endeavoured by construction as much as possible to unite the intention of the parties with Rules of Law, and give them a joint operation. On this account (among other rules, which are so many as to exceed all recollection) 1. They will lean more to intention in a Devise than in a Deed, for reasons already given. And yet a Devise of Land in construction has been distinguished as much perhaps from a Will of personal estate on the one hand, as it has from a Deed on the other. The particular penning of the Acts of Hen. VIII. authorising Devises, the additional requisites prescribed by the Stat. Car. II. as to their execution; but above all, the consideration of the Statutes having introduced a new Law in this respect, have occasioned a Devise to be considered as an execution of a power which, like all other powers, must (though in a liberal view) be executed in pursuance of the authority from whence it is derived.

2. They will often take many different Deeds respecting one transaction all together in construction, and consider them as one Deed. In the same manner as in construction of an Act of Parliament,

Parliament, all other Acts made in *pari materia* are taken as one and the same system; or in the same manner as all the parts of any one Deed, or of any one Act of Parliament, in order to explain a particular clause.

3. Courts of Equity, and Courts of Law, will follow the same rules in construction of Devises: and Courts of Equity, though they have, as I said, the exclusive cognizance of Trusts, will follow the same rules in construction of the limitations of a Trust, as Courts of Law do in the construction of legal limitations of estate.

And when we have this security in these and other fundamental rules of construction, there is but little reason to exclaim against variety of seemingly discordant constructions on the penning of particular Conveyances, each affecting to distinguish itself by some peculiarity of cant or expression, which must ever be at the risque of a different (and most often a fatal) construction.

§. 22. But these considerations at best are a digression from our subject of Conveyancing. When the Draught is perfect, the Conveyancer has finished the arduous part of his business. The Agent must see it properly engrossed and executed: when executed, the parties themselves must take care to preserve it.

And as far as concerns the Artist, if we were to recapitulate in a few words, in the abstract nothing more seems necessary in this art than to know what "degree of property the party is clearly " possessed of; what interest it is his intention to " convey; and if the intention is legal, how to " effectuate it by the best legal Form of Convey- " ance." Taking care here, as was said, in Plead- ing, in the first place to chuse a form suited to the

subject; and when chosen, to observe the necessary precision which that form requires.

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§. 23. It would be rather a paradox to the rules of politeness, or of honesty, to tell you, the reason of my not having kept my word with you is because you have kept yours so well with me, in giving me more satisfaction than I expected on the subject. I promise you I should not have spared any objections that had occurred to me on the foot of interruption; but you have in this part of your discourse not given me much opportunity. Another topic yet remains; as to which you will hardly be so fortunate, I mean what is commonly called "Practice of Courts:" by which I understand one mighty maze without any plan: where you may wander on without any guide to direct your steps, or any hopes of keeping the right path, if by chance you are once got into it.

E U N O M U S.

I will own to you, the knowledge of Practice can be acquired only by Practice; though as its rules depend on principles, it is as much a science as any other part of the Law is. It is impossible at present even to recollect those rules, and often difficult to investigate them. The very few books of any credit that have been written on this subject are written on a loose and unconnected plan; and after all speak only to the learned. This branch of Law is more than any other destitute of any elementary treatise. Whoever affects acquaintance with it, is left both to teach and to perfect himself in it by experience; and must not expect from any thing

thing hitherto communicated on this subject, to form an idea of it without a considerable attendance, and without making his own conclusions from a vast number of particulars. For the very few books about it are a mere common-place; distributed under some general titles, of use perhaps to Practisers themselves, but have no tendency to convey a knowledge of Practice. As I was led by these reflections to think upon this subject; and am satisfied the idea I had formed is a *new one*, so I am in some hopes it is not altogether inaccurate; and that it will place the thing in rather a clearer and less disagreeable light than it has been hitherto seen in.

§. 24. In unfolding my idea of practice, I shall speak to you as I would to the world, was I to write upon the subject: in which situation I would suppose my Readers persons first setting out in the profession, who either from Lectures in their University, or their own private Studies, had a tolerable notion of the general principles of our Law, though they had not as yet, or had but barely, set a foot in Westminster-Hall; and consequently had as little idea of the Practice of a Court as is possible: it being pretty clear, I suppose, that no-body is born with knowledge of this kind; and perhaps as clear that no-body would desire ever to acquire it without the prospect of a lucrative application. This being premised, a great part of what I have to say shall arise from the following case.

“ A Person (let us suppose) who has a Cause of
 “ Action, either in a Right detained, or an Injury
 “ done, is determined to bring his Action; and
 “ by his Attorney takes out Process against the
 “ Party complained of; in consequence of which
 “ the Party complained of (whom we call the De-
 “ fendant) either puts in common or special Bail,
 “ as

“ as the case requires. The Defendant being thus
 “ secured, the Plaintiff declares, in proper form,
 “ the nature of his case. The Defendant answers
 “ this Declaration ; and the Charge and Defence,
 “ by due course of Pleading, are brought to one
 “ or more plain simple Facts. These Facts arising
 “ out of the Pleadings, and thence called Issues,
 “ come next to be tried by a Jury. The Jury
 “ having heard the Evidence upon the Issue before
 “ them, find (we will suppose) a verdict for the
 “ Plaintiff ; on that verdict Judgment is after-
 “ wards entered. The Plaintiff’s Costs of Suit are
 “ then taxed by the Officer of the Court ; and the
 “ Judgment is put in Execution by levying on the
 “ Defendant’s Effects, the Damages given by the
 “ Jury and the Costs allowed by the Court ; which
 “ being done, there is an end of the Suit, and both
 “ Parties are once more out of Court.”

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Short and clear indeed ! But you forget that
 this view of a cause, without any interruption
 from the first Process to the Execution, compared
 with its real progress, is like the idea a traveller
 forms of a country beheld at a distance : mountains
 and villages appear much nearer than they really
 are ; the several intermediate valleys and various
 inequalities of surface being overlooked in so ex-
 tensive a prospect. And whoever thinks to see an
 end of a cause, in every case, by going regularly
 on without any delay from its commencement to
 its conclusion, proposes to travel as a bird does
 through the air. Design and accident may both
 stand in his way : and here, as in Mechanics, the
 whole motion which began in one direction may
 be deflected altogether into another.

EUNOMUS.

EUNOMUS.

§. 25. The Practice of a Court in Civil Suits, I own to you arises almost entirely “from the interruption” in the regular stages and course of a cause. Those regular stages (as to the time and manner of carrying them on) are themselves the legitimate offspring of the established Practice of the Court, where the cause is brought : when they are pursued, the course of the proceeding runs on smooth and silent, transacted by the Attornies in the cause and the Officers of the Court, without ever being heard of in open Court. The irregularities that push a cause out of its regular course must be redressed by the interposition of the Court : and it is this kind of business that furnishes and makes up a great part of the visible Practice of the Court in Term time.

§. 26. This idea of Practice will scarce be intelligible without going into particulars. I will do this with pleasure, because it will not only explain my notion more fully, but will give me an opportunity of vindicating the Law from a very popular objection, arising (if any where) from this quarter, I mean “its delay.”

I need scarce premise, that the Application to a Court by Council is called a Motion ; and that the order made by a Court on any Motion, when drawn into form by the Officer, is called a Rule.

In the case put, I said, the Attorney first takes out Process against the Defendant, in order to make him appear and put in bail. 1. The Process taken out may be irregular, and then it will produce *Motions to set it aside*. As for instance ; where the Defendant is a privileged person. 2. It may not only be irregular, but highly oppressive ; and then,

then it grounds a *Motion for an Attachment* against the Parties executing the Process, as for a constructive contempt of the Court. This is a general Motion, and may (as the oppression itself may) arise in any stage of the cause. The Suit itself, as well as the Process, may be irregular; and then it will occasion a *Motion to stay Proceedings in a Cause*, as either where the Parties have agreed to compromise the matters in difference, and a release is not executed; for the release when executed may be pleaded in bar of the action. The first Process may be regular, and the Bail may not; and then we hear of various Motions—either, 1. *To discharge the Defendant on Common Bail*, where it appears from the affidavit that he is not liable to give special bail; or where the affidavit to hold to bail is defective. 2. *To set aside a Judge's Order* made at his chambers relating to the bail. This kind of Motion may be made on other grounds; if the bail is regular in the manner of putting it in, but suspicious as to the circumstance of the bail; the Plaintiff gives notice, and the Defendant *moves to justify bail* in open Court.

§. 27. Having done with the Bail, we will come to the Declaration; and this will furnish several Motions as to the delivery of it—the frame and structure of it—or the neglect of it by the Defendant.

Perhaps it cannot be delivered in the common form, the party absconding to avoid it: and then the Plaintiff moves *that some other service of the Declaration may be sufficient*. The Declaration being delivered, the Defendant may apprehend it to be immoderately prolix and impertinent; in which case he will *move to strike out some Counts in the Declaration*: the Court usually, upon this, order it to be referred to the Master of the Plea Office, and the Master's Report is the ground of the Rule afterwards

afterwards made. *A Motion for the Master's Report*, is another Motion that may arise in various parts of a cause, as I shall repeat.

In an action, that is in its nature transitory, if the Declaration lays the Cause of Action in one county, and it did in reality arise in another, the Defendant may avail himself of that circumstance; and upon Affidavit apply to the Court for the Plaintiff *to change the Venue*, that is, the place where the cause of action is declared to have happened, from the first county to the latter. The Venue may likewise be changed from any county in England, wherever the Cause of Action arose, to that of Middlesex, where the Court sits, if the Defendant is privileged as attendant on that Court: or where the Jury, and not the Venue, is to be changed, as where the material evidence arises in the place laid; but no Jury, common or special, can be had disinterested (as where it is a County-Cause about a Bridge, or the like) it is usual to *move for a trial in the adjoining county upon entering a Suggestion on the Roll*.

A Suggestion on the Roll is sometimes entered for other purposes; as where the Sheriff, who regularly returns the Process, is partial: and this too even in the return of the Freeholder's Book for a Special Jury to be struck by the Officer of the Court; in that case the Coroner must return the list; and even where this precaution is neglected, a challenge may be taken to the array of a Special Jury at the trial.

If a Declaration is substantially defective, the Defendant, instead of answering, demurs to it. The exception he takes, is thereupon solemnly argued in Court; if allowed, the Defendant has final Judgment; if disallowed, there is Judgment against him to answer farther. If, on the other hand, the
Declaration

Declaration is delivered; and is unexceptionable, and the Defendant neglects to answer it in due time, the Plaintiff has his Judgment by Default; but if the Plaintiff is over hasty in signing this Judgment, the Court will interpose *on a motion to set aside the Judgment*: in consequence of which, the Defendant will be at liberty to plead. The Motion to set aside a Judgment obtains in other instances; and the Motion for Judgment, as in case of a nonsuit, arises on another ground: both which I will shew.

§. 28. When the Defendant comes to plead to the Declaration, instead of making in due time a plain denial of the charge, called the *general issue*, he may find it necessary to vary the common course, either by enlarging the time or the manner of pleading; in which cases he will *move for time to plead*: which being a matter of indulgence, the Court upon the equity of the case may refuse or grant: and grant without or upon terms. At Common Law, you know, a Defendant could only plead one single matter: which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed inartificial pleading, the party endeavouring to crowd as much reason as he could into his plea, however intricate, repugnant and contradictory he made it by so doing. The Legislature thought it necessary to remedy this great defect, and have enabled the Defendant, as it were, to open as many trenches against the enemy as the nature of his ground will permit. By these means the fort indeed is oftentimes rendered impregnable; but sometimes the siege is only protracted. However, to drop our allegory and go on with the cause; if the Defendant thinks more than one plea necessary, he *moves the Court for leave to plead several matters*, which he mentions. Sometimes this expedient is an after-thought, and then

as it tends to delay the Plaintiff by putting him out of the beaten track, the Defendant *moves to withdraw the general Issue* and be at liberty to *plead specially*; sometimes he moves the contrary.

§. 29. The Plea, Replication, Rejoinder, &c. if they are so lucky as to escape Demurrers, are at length quietly settled on Record, and come to that happy period called an Issue, which remains to be sent to a Jury: in order to which all the Record down to the Issue which it includes, is transcribed from what is called the Plea Roll, and which is only part of a large bundle comprehending the cases of a hundred other persons, and never stirs out of custody of the Court. That transcript is called the *Nisi Prius* Roll: as the *Nisi Prius* Roll, after it is returned from the trial, assumes the Name of the *Postea*; terms you will allow extremely significant when their origin is compared with their application, however barbarous when they stand by themselves: as awkward perhaps in the eye of prejudice, as a foreigner may appear to the vulgar of our own country; and for no other reason but because his dress and manner are different from their own.

§. 30. Between the Issue and the Trial several Motions may happen which may either put off the trial or not. Of the latter kind, and at this stage, is a Motion by the Defendant for leave to *pay money into Court*; which is an admission of so much being due, and nonsuits the Plaintiff if he does not prove at the trial that more is due than what the Defendant has so paid into Court. The same kind of application has been extended to goods of various kind in dispute; but as to these the Court has been rather shy in granting the Rule, and has said more than once, "that they do not keep a warehouse;" and indeed Westminster-Hall would hardly be big enough

enough for the purpose, if this kind of application was much indulged; besides, no Recovery in a Personal Action, except in that of detinue, is specific as to the thing itself, though it is as to the value; and consequently as the thing, when so returned, may be in a worse condition than when it was taken, the Plaintiff would be worse off by having it brought into Court, than if he had damages estimated according to the value of it at the time it was taken.

Many circumstances may make it necessary to postpone a trial, or vary the common forms of examination. The necessary witnesses in the cause may reside altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial: in the first case the Court is moved for *a commission to examine witnesses on interrogatories*; which interrogatories are settled here, sent over, and with their answers properly attested are sent back and read in evidence at the trial: in the latter case, the trial is delayed, on motion to *put it off for the absence of a material witness*. But suppose by this delay the other side are likely to lose evidence that is ready at the time, either in case a material witness is so old and infirm that he is not likely to survive the arrival of the evidence expected by the other party? or in case his necessary business, as a trading voyage or employment abroad, obliges him to leave England before the trial can come on?

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That part of the delay you are now considering reminds me of an odd anecdote I have heard of this nature: a cause of consequence was put off for some years during Queen Anne's Wars, on a motion

motion from time to time to put it off, on the absence of the Duke of Marlborough, who was a material witness, and obliged by his post to be often backwards and forwards.

EUNOMUS.

In a case however far short of that, you will agree that the indulgence to one side in putting off the trial would produce an injury to the other; unless some provision was made on his part by way of equivalent: and therefore whenever that is the case, on the other side a *motion is made to examine such witness de bene esse*; the consequence of which is to admit the depositions so taken as evidence, if the person cannot afterwards be examined in chief at the trial. What if a witness is under none of these incapacities, but being duly summoned neglects to attend? his negligence ought not to prejudice the opposite side, though it does an injury to the side which summons him. The trial in that case then ought not to be put off as a mere matter of indifference. The other party has brought perhaps a waggon full of witnesses, has made out his briefs, and his briefs are delivered to Council: in that situation the other side must either go on with the trial and place his miscarriage to the absent witnesses account; or he must withdraw his Record, and pay the other side their expences for attending the trial. Hard he should do either, and the witness himself, the cause of the mischief, remain with impunity. The Law therefore gives two remedies against the witness in such a case—
1. Either to bring an Action upon the Statute to recover the penalty expressed in his summons; or
2. The Law in vindication of the contempt itself
has

has suffered by his neglect, will punish him criminally, on a *Motion for an Attachment*.

But we have hitherto been considering only parole or living evidence, as having an influence on the delay of a trial- The same must in many cases follow from written testimony. Thus for instance, among other particulars, we often hear of *Motions for leave to inspect and take Copies of Corporation Books*; or of *Motions for an order to produce them at the Trial*.

§. 31. And not only the Witnesses in a Cause, but the Jury occasion particular applications to the Court: so does the nature of the Cause in question; and so does the course of judicature itself. The nature of the Cause will sometimes require the Jury to see the very spot where the matter in dispute arises; in which case, after Issue joined, the Court is *moved for a view*. The Cause is at other times either of that nature that it may exceed the apprehension, or be likely to inflame the passions of a common Jury; in either case, a *Special Jury will be moved for*, composed of Gentlemen of superior understanding, and less liable to influence, than country people in general can be supposed to be. Sometimes the Cause is apparently likely to be very long, intricate, and important: important, I mean, both in its value and consequences; circumstances which make it neither eligible to bring it on before a single Judge, or within the confined limits of an assize commission. Besides, it is very well known (so much does great modesty inseparably accompany uncommon merit) that Judges of the greatest abilities have usually declined giving any decisive opinion on important points arising at the trial in the country: in consequence of which, what with all the train of expence and delay attending the argument of a Cause
or

or Special Verdict; it is sometimes much better at once, all things considered, to bring the Jury and Witnesses up to town, and try your Cause before the whole Court. From these considerations arises a *Motion for a Trial at Bar*; which being allowed, very often the points are determined, as they arise, by all the Judges of the Court, and satisfaction given to both parties: in which case the extraordinary expence of the trial is more than balanced perhaps by the consideration of its being most probably decisive.

§. 32. After having thus gone a little out of the way to put a case less common, let us once more return to the common case, and imagine the Cause brought to the Assizes, the Jury sworn, and the Witnesses (if you will) examined. The trial goes on, or it does not—if it goes on, either a verdict is given, or there is not—if a verdict is given, it is either given for the Plaintiff or for the Defendant. The Jury may be sworn, and the Witnesses may be in part examined, and yet the trial may stop; because the Parties may then, or at any time, compromise the matter in difference, or agree to refer it to arbitrators: in either case a rule is made at the assizes (called an order of *Nisi Prius*) and motion is afterwards made *to make the order of Nisi Prius a Rule of Court*. This is always done upon consent of both sides, and is the best security of performing an agreement or an award; because it engages the best second in the world to fight with your antagonist, by making the injury done to you a contempt of the Court.

Well, but suppose the parties are as averse to a reference “as the widow Blackacre in the play*,” the Cause then, it is plain, must go on: it may go on, and yet not get to a verdict; because if the Plain-

* Wycherley’s Plain Dealer.

tiff does not prove his Case, the Defendant calls no evidence: and instead of a verdict on either side there is a nonsuit. Wherever a verdict is given, the Plaintiff at least must give evidence to maintain his declaration: where evidence is produced on both sides, the verdict is given for the Plaintiff or Defendant, according to the superior weight of evidence.

§. 33. Here closes the trial; and from this period it is that the Record assumes the name of the *Postea*; and if the trial is decisive, by neither the Law nor the Fact being afterwards controverted, the *Postea* is delivered by the proper Officer to the Attorney of the victorious Party to sign his Judgment: but in many cases after a verdict given, there is room to question its validity; in which case the *Postea* remains in custody of the Court. The verdict may be exceptionable either from misdirection of a Judge in point of Law, or the misbehaviour of the Jury—in which case a motion may be made *to set it aside*, (as it may on other grounds)—or from a manifest imputation on their Judgment in its being clearly contrary to evidence; or in the damages given greatly exceeding the injury sustained; in both which respects a *new trial may be moved for*: or if the verdict itself stands unimpeached, yet some original defect may appear on the face of the Record which shews no verdict ought to have been given, or though given no Judgment can be had on it: and when this happens, the motion is in *Arrest of Judgment*. Supposing the Verdict and Record to stand clear of all objections, the Judgment follows of course; and after Judgment, Execution. The purpose of which Execution is to levy the damages assessed by the Jury, and the costs allowed by the Court. The Execution however may for a short time be interrupted, in case any objection arises to the taxation of costs; and then a motion may be made for the Master to
review

review his taxation. This and every act of the Master being liable to be reviewed on appeal to the Court; though in judging of ordinary stages of Practice, he is invested with original and competent jurisdiction: this Officer, both in his situation and employment, bearing no very remote analogy to the Judex Pedaneus of the Roman Law. The Execution may be suspended on other grounds; the original party may die, in which case (where the action is not personal) a scire facias must be had against his executor: or sometimes, where the original party is still living, instead of an Execution had on the Judgment, an Action of Debt may be brought on it. That action, unfavourable in the eye of the Law, because it is commonly the offspring of negligence and oppression,) may for instance be brought where an Execution against the goods was preferred to that against the person, and it comes out from the return of the Sheriff that no goods are to be found. If the Sheriff in this respect returns a falsity in fact, or in point of Law by an illegal preference of one demand to another, he is liable to an action for such false return. But if he or his Officers misbehave in this kind of execution, or in any other service of a writ, they are liable to an Attachment; which, as I hinted, is a remedy the Court have always at hand to redress the oppression of their Officers in any stage of the proceeding: and it would be well if it was considered by them like the drawn sword of Damocles ever hanging from a slender hair, with the point just over their heads, and ready to fall upon them.

§. 34. When Execution is over, the Cause is over: and the Parties cannot well have a longer heat than in the course I have described. But a Cause may on many occasions come much sooner

to an end ; and in a direction very different from what has been mentioned.—It may come sooner to a trial—or it may come to execution without a trial. I will begin with the latter. In the case I put at setting out, and in the general exposition of the case, it has been supposed that the Defendant pleaded to the Declaration ; but it was intimated, that if he neglected to plead, Judgment would be had against him by default, It was not so proper at that time to pursue the consequences of that measure : but now I must observe, that in consequence of the default of a plea, the truth of the fact is confessed, and cannot be afterwards litigated as it is on a trial : but this Judgment, though it operates so as to preclude the Defendant from controverting the fact, which is the cause of action, does not go to a confession of the damages laid in the Declaration ; for a person may lay any damages in his Declaration, and is not at liberty to recover more than he does lay, even though he proves it on evidence ; because, perhaps, no parole proof shall prevail against his own admission on record. But with this liberty of laying damages to any amount, it would be manifestly unjust should he recover any more damages than he actually proves : that he should be permitted to form an imaginary scale of his own, and others be obliged to conform to its measure. And therefore in every case the actual proof of damages must ever precede the recovery of them. In the case of a Judgment by default, instead of the common process and the regular formation of an issue, as in the common course, a writ of enquiry goes to the Sheriff, who summons a Jury for the purpose of ascertaining the damages : till this is done, the Judgment is called Interlocutory, in opposition to a final complete Judgment. In this course of proceeding other motions may arise—to set aside the
Judgment

Judgment and Writ of Enquiry issued thereon, as irregular—to execute a *Writ of Enquiry* before a Judge instead of the Sheriff, where it is a matter of importance—and sometimes for a *new Writ of Enquiry* for excessive damages, in the same manner as for a new trial on those grounds. When the Writ of Enquiry has been duly executed, then the cause comes out of this by-path, and goes on in the old road to the regular Judgment and Execution.

§. 35. There are two cases, however, where the admission of the Defendant silences all future enquiry either as to the truth of the fact, or the quantity of the damages: and consequently supercedes both a common trial and writs of enquiry—that of a direct “confession of the action”—and a warrant of Attorney to confess a Judgment: this latter occasions a motion very often; for where it is above a year standing, motion must be made *for leave to file the Warrant of Attorney* on affidavit of the Defendant being still alive and the debt unpaid.

When I said, just now, a matter may come sooner to a trial, I alluded to what is called an *issue directed* by the Court; which obtains in a Court of Law principally where a question of civil right is involved in a criminal prosecution for a misdemeanor; in which case, it is the usual lenity of the Court to suspend the latter till the former has been tried? or where a Court of Equity directs facts to be enquired of at Law, and does not rest the case on depositions. And this manner of trying the fact, by directing an issue, has great advantages over a regular form of action: 1. In being better adapted to the real merits of the case. 2. In avoiding the delay and intricacy of Pleading. And it is in effect pretty near the method that I said had been proposed as a substitute for special pleading

in all cases: for under the form of a wager, the real point between the parties is always brought into question.

§. 36. Thus have we, in a regular analysis of a civil suit, seen how a very great part of the Practice of the Court in causes does arise. The general motions have been progressively pointed out in the natural order, though in the course of practice they must be made promiscuously: and though in this view they appear but few and simple, are yet capable of being infinitely diversified as to their objects.

After having so minutely traced the smallest fibres of this branch of practice, let us endeavour to consider practice itself as one whole; and see what other divisions it is capable of, and which may assist in giving a general idea of it.

It is evident from the least recollection, that what has been said relates merely to the practice of the Court in civil suits; and in general concerns the trial of a cause; and therefore the former subject may be for a moment resumed, in order (by way of giving a fuller general idea of practice) to establish a distinction between such motions as are in their nature *previous* to the trial itself, or *subsequent* to it. Of the former sort are motions—to stay proceedings in a cause—all motions relating to bail—all relating to declarations—to the time and manner of pleading—for changing venues—special juries, and many others we have just considered. Of the latter sort necessarily are motions to set aside verdicts—for new trials—in arrest of Judgment—motions concerning writs of enquiry, and others that are easily classed according to this division from what has now passed. There are some Motions too, you will remember, that in the abstract are of an ambiguous nature, and may arise in any
part

part of a cause, either before or after a trial. Such, doubtless, you will allow are Motions for an Attachment—and for a Master's Report—and there may possibly be others, though I do not at this time recollect them.

§. 37. Every Motion hitherto has been supposed to have some relation to the trial of a cause; there are some few intirely independent of it—such may a *Motion for a Prohibition* be in many cases; such are many applications to the Court for summary relief on Acts of Parliamen^t—as relating to articles of Clerks, to Attornis—Insolvent Debtors, and others of that stamp.

POLICRIT S.

In this analysis you seem to have passed over the capital distinction of a court of Law considered as having civil or criminal jurisdiction: having so fully discussed the former, I hope you do not mean to forget the other.

EUNOMUS.

§. 38. The Crown business (which was originally the only branch of the jurisdiction of the Court of King's Bench, and of which it still retains exclusive jurisdiction) must be treated of in a different method, from that I fell into in describing the course of Practice in causes between man and man. There I deduced the great outlines of Practice from a minute analysis of a civil action: the Practice of Courts of Equity may be deduced in the same manner, by attending to the several stages from the filing of the Bill to the Execution of the Decree. The conformity is so obvious that it is unnecessary

necessary further to unfold this idea by recurring to particulars.

The Practice on the Crown-side will not admit of the application of this idea : much the greatest part of it is independent of any solemn trial ; and the trials themselves are too simple to endure much interruption, or branch out into any points of Practice. I know not how to explain it better than by dividing the Crown Practice into such matters as originally commence in this Court ; and such as are removed into it from other inferior jurisdictions. Of both which kinds taken together (for we need not distinguish them minutely at present) are, Motions for an Habeas Corpus—for Mandamus's—to exhibit Articles of the Peace—Motions relating to the discharge of Recognizances, to remove Indictments, Orders of Sessions, Convictions made by Justices from their common ordinary course of proceeding by Writ of Certiorari into this Court, on some foundation of complaint against them. The visible Practice that occasions this removal, and that arises from it, may be resolved into these few Motions, very simple in their kind, though infinitely diversified as to their objects.

1. The general *Motion to remove* the Indictment, the Order or Conviction *by Certiorari*. 2. *Motion to quash* the Indictment, Order, or Conviction when it is removed. And in the case of an Indictment removed, either on a Demurrer it is set down to be argued ; or *Motion is made to quash* it before trial, or *Motion in arrest of Judgment*, or *Motion for Judgment*, after the trial. The *Motion for a special Jury*, as well as some other Motions already mentioned, may accidentally be made in the case of an Indictment, as it is in a civil suit.

2. But the most extensive jurisdiction is involved in matters of original cognizance, whether it regards

gards Indictments or Informations—or such matters as are entirely independent of either, or any solemn trial; such as begin and end on Motions: but of all this I need not be very particular.

There is little or no difference between an Indictment commenced in this Court, or removed from another county, as to the Motions concerning them. As to Informations, though altogether the creature of this Court, they admit but of three Motions—the *application to the Court to grant it*—when granted and tried, a casual *Motion in arrest of Judgment* on grounds arising from the Record itself—or where the charge in the Information and the Verdict are both incontestable, the *Motion for Judgment*.

§. 39. You must have observed, there is a pleasing simplicity in Crown Proceedings, that at the same time it favours the Liberty of the Subject, raises the dignity of the Law itself: that at the same time it has stood the test of ages, has stood unimitated or unequalled.

POLICRITES.

Whatever may be said of them, by way of commendation in this respect, they have not however escaped censure in another. In particular, the form of Prosecution, by way of *Information*, has been much inveighed against when compared with *that of Indictment*.

EUNOMUS.

Whether this has been done on just grounds may be worth while for us to stop and consider; and the rather, because the path is not so much out of our way as new in itself.

Let

Let us see wherein they agree, and wherein they differ. They agree in this, that each is *only an accusation* of a crime; and where each has the same crime for its subject (as it may have in many misdemeanors) the punishment may be exactly the same: because supposing the punishment in such cases discretionary in the Court, the Court does not necessarily attend to the mode of prosecution, in fixing the nature or quantity of the punishment.

But they differ, it may be said, in this, that the accusation in one shape is more rigorous than in the other; and that though the punishment, as to (the strict idea of it) the sentence of the Court, be the same, yet the consequences of one mode of prosecution being more severe than the other, one mode may be said to be much more penal than the other.

When I do most heartily give the preference to that of Indictment, as the most ancient, approved, constitutional form of proceeding, I must not be so partial as not to own an Information has its great use in many cases where an indictment cannot be had; and that though an Indictment upon the whole is preferable, yet an Information has many peculiar advantages to the Defendant, that are overlooked by prejudice and inattention.

The most glaring circumstance that distinguishes the method by Indictment, and seems to give it so great a preference to an Information, is the manner in which the accusation by Bill is made. In every Bill found by a Grand Jury, twelve persons at least must concur in finding the facts that are the grounds of the accusation. In a prosecution commenced by Information, only four can give an opinion as to the weight of the charge laid before them; a concurrence of three is sufficient to direct the prosecution; or even two, who may be the only persons present in Court, Setting aside
therefore

therefore any supposition of superior abilities and greater experience resulting from the particular situation of the persons who decide on the latter; it may be said, in a Judgment of facts (of which every man is presumed a competent judge) a Defendant has naturally a greater security for a right Judgment from a greater number. He has this advantage too in a proceeding before a Grand Jury, that if they judge in his favour, by throwing out the bill, he is entitled to his action against the Prosecutor for a malicious prosecution, in the same manner as if the Bill had been found, and he was afterwards acquitted on his trial: but tho' an Information is refused on application, or tho' the Defendant is acquitted on his trial, I do not know, that in either case, he has any remedy for a vexatious and oppressive Prosecution; and yet the expence, which is the ground of the action in the first case, is much greater in every shape in the latter.

These circumstances tending to guard any one from an undue Prosecution, or giving him the means of avenging an attempt towards it, will naturally be considered as inclining the balance much in favour of Indictments. But then before the other Prosecution can be directed, a person has opportunities of defending himself, which he has not in the former. He can be heard on oath in answer to the charge made; and the Court judges on weighing the Affidavits of one side against those of the other: but a Bill preferred before a Grand Jury is a proceeding merely ex parte; it is an accusation which is to be answered hereafter: but this though, as it precludes nothing at a future trial, it is no more than an accusation; yet as it undergoes so close an examination in the outset, may be justly considered as a kind of trial in itself. As such an enquiry therefore, when it terminates
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in conviction, induces a stronger presumption of guilt; it does with more propriety aggravate the expence, if not the punishment.

But this previous examination is full as material in its consequences to the Defendant at the time of his trial, as it was at the time of making the charge. He can confront the witnesses with their own affidavits; and the credit of their evidence at the trial will depend on the consistence of it with their former account. And as this circumstance more easily leads to the detection of Perjury, it is in some measure an equivalent to the advantage in the other case from an action for a malicious Prosecution.

Let it be remembered too, that since the Statute of King William, this mode of Prosecution is on a much better footing than it was formerly, in which indeed it was open to very just complaints. Now it must be either applied for in open Court, or filed by the Attorney-General, and not the Coroner, or Master of the Crown-Office, as it was before; though it has been supposed that the Bill was intended to have been much more comprehensive in its restrictions than it was, as it afterwards passed.

It is scarce incumbent on me to add, that most of the Motions that have been all along mentioned in considering the course of Practice, are attended with Affidavits, or sworn depositions in writing. Courts of Justice seldom give any credit to parties but upon oath; indeed, how could they, when each side would demand the like credit to their assertions, though what they asserted was in contradiction to each other? It is much to be doubted, whether the oath itself upon all occasions deserves credit: but supposing it does in general, thus much may be observed of Affidavits, that the reason of the Motion being made, the perspicuity
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of the facts to be disclosed in it, and the opinion of the Court upon those facts, all depend ultimately upon them. An oath in all judicial transactions is the dernier resort in quest of truth: and so much is an oath regarded by the Court upon these occasions, that when Affidavits are full and positive, the Court has less room to go into circumstances. But when they are evasive and contradictory; and while falsehood, that must lay somewhere, is concealed, because the credit of the party falsifying is, as yet, unimpeached; it would be impossible to come at the truth, without sifting the Affidavits themselves; whence, by comparing the circumstances, it may be found (if possible) on which side the justice of the cause is placed: and where, for want of it, a miserable support is borrowed from enormous Perjury. It must be own'd, that iniquity, ripened by some experience, is often capable of framing such Affidavits, that, like Milton's Hell, they shall discover

“ No light, but rather darkness visible.”

Sometimes, one would think, the success of the cause depended merely upon swearing last.

I can not but observe, there seems to be no crime that deserves its punishment more than that of Perjury; for no crime can have consequences more universally destructive. Does not every trial, and all determinations in Courts of Justice, whether life or property is at stake, depend upon evidence on oath? Among the arguments on every side of us, there is none that more forcibly proves the use of Religion in society, than the general use made in society of this act of Religion, called an Oath. There is none, we may add, shews a
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greater

greater contempt of Religion, than a breach of Oaths ; and, in proportion, as Perjury gathers strength, and comes off with impunity, nothing bids fairer for the utter subversion of Law and Justice, and, in the ruin of them, for the dissolution of society.

But this is not the only, though the principal, complaint against some Affidavits. The matter of them is not only often false, but as often frivolous. Instead of containing positive assertions, as from their nature they ought to have, they are stuffed with impertinent stories and conclusions from supposed facts, instead of the facts themselves, that ought to be positively alledged. Often you will observe, the very language of Affidavits renders them suspicious, by being too artificial ; as when countrymen express their knowledge of the facts they attest,—

Velut innati triviis ac pæne Forenses ;

or when two Affidavits are too similar to have been made by different persons.

After these slight and general remarks on Affidavits, I have nothing further to observe concerning them, but that they may be distinguished as to their different subjects—either as they are Affidavits of Notice only ; or as they go to the merits : and it is to the latter kind that what has been said above is to be applied.

§. 40. Now to recapitulate all that has been said in a few words—Practice in general, it appears, is either in Civil or in Crown Causes. In Civil Causes it is either independent of a trial, or relative to it—If relative to it, arises either from something applied for before, or after the trial.

trial. As to Crown Causes, you remember, only one distinction was insisted on, either as Practice concerned the original jurisdiction of the Court, or such as is exercised, as it were, on appeal. And unless I was to read over to you a hundred printed Rules of Court, and the several Cases and Books on this subject (which, by-the-bye, I would not wish any enemy I have to do) I can not undertake to be more explicit on this subject.

POLICRITES.

After you have been at the pains of so long a soliloquy, I should be ashamed to attack you under any head but that of palpable omission. Though you have exceeded the stretch of the legal fiction, "that makes the Term but as one day;" and in this view of Practice, may be said to have brought many Terms into one, or in more animated phrase, "have turned the accomplishments of many years into an hour-glass*;" yet give me leave to say, you have in one respect put me in mind of a fly buzzing about a candle; you have been round and round about the light without touching it; you have brought every part of Practice to the point of trial, and yet not said a word about the trial itself.

EUNOMUS.

§. 41. Reflect a moment on your own comparison, and you will want no answer. What would become of your poor fly, if he approached too near

* Prol. to Hen. 5.

the light? The danger of attempting this subject would not be less; the difficulty of describing it would only prove the weakness of the undertaking. This field of Practice, I will own to you, I think, of all others, is the most extensive, and gives one of the noblest views of our legal constitution. But great as it is in speculation only, the idea of it in the abstract will fall very far short of what any one will conceive from a short attendance on the Practice. Besides, where should I begin? or rather, how could I say enough of the excellence of the form, regulations and improvement of Juries? of the incomparable manner of sifting truth in the personal examination of Witnesses? of the admirable display of reason and eloquence in the observations on Evidence, and the address to the Jury? and of the extreme caution the Law has observed in so nicely separating the peculiar provinces of the Judge and the Jury; and when it has left the exclusive determination of the weight of Evidence to the Jury, the care it has taken that the Judge, in his recapitulation of the Evidence, shall repeat to them the material facts, naked and undisguised with the deceitful colouring of interest or of eloquence?

POLICRITES.

§. 42. It is this "very colouring" that the world so much object to, and which, in many cases, makes truth so unlike herself, that it is not always easy to know her: so that if you decline expatiating on the excellency of this form of trial, I hope if it was only in regard to that, you will say a word about the abuse of it. The Judge and the Jury I say nothing of: indeed, in this respect, there is no room to say any thing: the mistakes of
either,

either, (as you have said) should : his happen, may be set right after the trial. Buterial misrepresentations in other parts of the Proceeding are innumerable, and yet I know not how they are ever prevented. I will state the objections in the very words of an old Citizen, who having been so unfortunate the other day as to lose a cause of considerable value, and, as he conceived, from the perversion of Truth and Justice, not the want of it in his own case, very innocently took his revenge by abusing the whole Profession in a large circle of his acquaintance.—“ The story of the “ Cow (meaning, I suppose, Swift’s Cow) he “ said, was not more satirical than true; and it “ was far short of the real abuse. A string of witnesses are put into a brief, some of whom are to “ prove that two and two may make five, or that “ they never heard they made only four, just as “ occasion requires : or if they come inclined to “ speak the truth, the other side are prepared “ either to shew that they are not to be heard because it is barely possible they may have a half-penny interest in the consequences of a possible determination; insomuch that, I believe, if a “ Testator in a Will of his Lands was to leave one “ of the subscribing witnesses only a halter, he “ would not be admitted as a credible witness : “ or else the cross-examination is to be spun so “ fine that a man is at last beat out of common “ sense, and is brought to contradict himself a “ hundred times without perceiving it; or when “ every other topic fails, the witness is to be “ abused, because he does not know what he is “ called for, or because he does not, or because he “ will not, say more than he knows. This raises “ a laugh among the country people ;

Solventur risu Tabulæ.

and

the light? The danger of attempting this subject would not be less; the difficulty of describing it would only prove the weakness of the undertaking. This field of Practice, I will own to you, I think, of all others, is the most extensive, and gives one of the noblest views of our legal constitution. But great as it is in speculation only, the idea of it in the abstract will fall very far short of what any one will conceive from a short attendance on the Practice. Besides, where should I begin? or rather, how could I say enough of the excellence of the form, regulations and improvement of Juries? of the incomparable manner of sifting truth in the personal examination of Witnesses? of the admirable display of reason and eloquence in the observations on Evidence, and the address to the Jury? and of the extreme caution the Law has observed in so nicely separating the peculiar provinces of the Judge and the Jury; and when it has left the exclusive determination of the weight of Evidence to the Jury, the care it has taken that the Judge, in his recapitulation of the Evidence, shall repeat to them the material facts, naked and undisguised with the deceitful colouring of interest or of eloquence?

POLICRITES.

§. 42. It is this “very colouring” that the world so much object to, and which, in many cases, makes truth so unlike herself, that it is not always easy to know her: so that if you decline expatiating on the excellency of this form of trial, I hope if it was only in regard to that, you will say a word about the abuse of it. The Judge and the Jury I say nothing of: indeed, in this respect, there is no room to say any thing: the mistakes of
either,

either, (as you have said) should happen, may be set right after the trial. But the misrepresentations in other parts of the Proceeding are innumerable, and yet I know not how they are ever prevented. I will state the objections in the very words of an old Citizen, who having been so unfortunate the other day as to lose a cause of considerable value, and, as he conceived, from the perversion of Truth and Justice, not the want of it in his own case, very innocently took his revenge by abusing the whole Profession in a large circle of his acquaintance.—“ The story of the “ Cow (meaning, I suppose, Swift’s Cow) he “ said, was not more satirical than true; and it “ was far short of the real abuse. A string of witnesses are put into a brief, some of whom are to “ prove that two and two may make five, or that “ they never heard they made only four, just as “ occasion requires : or if they come inclined to “ speak the truth, the other side are prepared “ either to shew that they are not to be heard because it is barely possible they may have a half-penny interest in the consequences of a possible determination; insomuch that, I believe, if a “ Testator in a Will of his Lands was to leave one “ of the subscribing witnesses only a halter, he “ would not be admitted as a credible witness : “ or else the cross-examination is to be spun so “ fine that a man is at last beat out of common “ sense, and is brought to contradict himself a “ hundred times without perceiving it; or when “ every other topic fails, the witness is to be “ abused, because he does not know what he is “ called for, or because he does not, or because he “ will not, say more than he knows. This raises “ a laugh among the country people ;

Solventur risu Tabulæ.

and

“ and the Judge for or against the Plaintiff, as
 “ the Defendant or the Plaintiff are made most
 “ ridiculous in the course of the cause.”—Thus far
 the old Gentleman.

E U N O M U S.

§. 43. And thus far will many people go when actuated by peevish discontent. How apt are we in most cases to transfer the incapacity any where from ourselves ? No wonder if a man, judging of his own case, is induced to think others in the wrong, who do not think as he does ; and according to the degrees of partiality in his own breast to call the event ill-luck—ill-fate—or injustice. One could not else well account for one man supposing himself wiser or juster than a whole Court ; if it was not that he made himself a judge in his own cause : it is happy for us we are not. The kind of reflections you mention generally proceeds originally from the same circumstances the old Citizen was in ; and like all other scandal, once invented, is much easier propagated than refuted.

It is the duty of Council to represent their Client's Case according to instruction : that instruction is to be their indemnity on the one hand, as on the other every aspersion for which they have no instruction they are answerable for in a course of justice ; because as the Law will not permit even affidavits upon oath of the party, by going out of a charge, to be instruments of scandal, much less will it endure a voluntary abuse by a third person in going out of the course of evidence. On larger grounds, it may be said, every Agent of a Court of Justice (whether Council, Attorney or Officer) is strictly amenable to it for his conduct ; and as the Law for excellent purposes, in consequence of
 the

the trust reposed by any person in his Agents, will not oblige them *to disclose* the material circumstances of his case in giving evidence; so will it not endure any body, under pretence of being Agents, to vent scandalous reflections without authority. This I mean to say as to any thing advanced during the hearing of a cause on any persons characters independent of evidence. But the comments that are made upon the evidence produced, or on the consistency and behaviour of witnesses, can never, I think, be deemed scandal in themselves, though they may lead to it in the conclusion. If such observations on evidence were not to be made with the utmost freedom of judgment, the course of justice itself would be interrupted: the conclusion from these, if it does affect the character of the parties or the witnesses, is no other than what every moral agent (as such indifferent and unprejudiced) who happens to be present, must draw from the whole of the story he has heard.

And as to the personal ill-treatment of the witnesses, which your instance put does more than insinuate, whenever it does happen (though I hope it has been oftener imagined than observed) there is always a power present able to controul it. But surely to contest the evidence by the strictest cross-examination, is by no means to be deemed scandal, even though in the result the veracity of a witness may be rendered questionable. In this respect, the most perfect scepticism is the direct road to justice; for truth is consistent with itself, and will stand the test of the closest examination: it is the only way to correct mistakes; and if Perjury is latent, to detect it and bring it to day-light. Cross-examination, I may say, is the *Rack of the mind*; it is the *only torture* the Law of England allows in the pursuit

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of

of truth; and it is a *torture only to an evil conscience.*

This will be an answer as to the severity of examination: as to the humour that incidentally arises in some species of causes, and is furnished by the figure, demeanour and course of evidence of some witnesses, it generally passes off lightly, and is, not uncommonly, equal on both sides: but the effect of it, as to its weight in the cause, I may venture to add, is as transient as the laugh it occasions. Besides, a very little observation is sufficient to convince every body, that the recapitulation from the bench, will easily divest any little prepossession in the Audience gained by a jest or piece of humour. Though, in the mean time, I know of no transaction in life that may be more justly considered as a kind of *natural comedy*, than some kind of trials are: in which the story itself often exhibits a most diverting picture of mankind, especially when the main plot is animated by a kind of under-plot that discovers itself in the peculiar characters and passions of the witnesses; many of whom, though they come with an earnest intention to serve the truth, yet when they are warmed with a little examination, are apt to intermix some little passions of their own, with all the vivacity of genuine humour and quick repartee,

POLICRITES.

§. 44. But what between the misrepresentation of evidence, the misinstruction as to witnesses, and their account being naturally imperfect as they were not concerned in point of interest to remember what happened, or never thought at the time it happened they should be called upon to give any future account of it; it has been objected to the

the Laws of England, and thought to be a great speck in our administration of civil justice, that no person is allowed to speak for himself.

EUNOMUS.

The objection, to give it any weight, must mean, that no person can be a witness in his own case—for speak he does, or may, both on Record—and by the instruction he gives his Counsel as to the fact.

POLICRITES.

In particular instances, however, is not this complaint made with a seeming propriety, as involving in such cases particular hardships? A tradesman, suppose, delivers goods to the buyer himself, no-body else present; or to the buyer's servant, who has left the place and not to be found; the tradesman cannot be a witness in his own case, and having no other witness to prove it, must lose his debt.

EUNOMUS.

That the Law will not allow him to be witness, I grant; but it is not a clear consequence that he must lose his debt. Upon general principles, you must allow, it is extremely right, that the law will not allow a man to be a witness on oath in his own case: a witness in substance, though not in form, he is. He tells his own case on Record; and the circumstances of it by his Counsel. It is well in the main he is not heard on oath; what Perjury would it introduce? and few cases are so destitute of evidence as the case put. By the Law of Eng-

land a man may oblige his witnesses to come: and if a material witness is absent for a time, and may be had in a reasonable time afterwards, it is, you know, every day's practice to put off the trial till he can be procured.

But in reality the case put (though seemingly a great hardship) will rarely happen: the inconvenience, by being universally known, may in general be prevented. This Rule of Law is founded on excellent principles; and it is the happiness of our Law to be settled and known. A very little experience will teach tradesmen this piece of knowledge; and one would think no one in general would deliver goods not paid for without some caution.

But even in the case put, he is not absolutely without remedy; it is true he cannot be a witness at Law, and has no other on his side: but he has a remedy in Equity (as I should suppose); for, on the one hand, where there is as good a remedy at Law, none ought to be sought in Equity; because Equity is in its nature to follow, not to take place of the Law; and indeed it is the constant language of every Bill that the Plaintiff has no remedy at Law: it may thence, on the contrary, be inferred, that where he has no remedy at Law he must have one in Equity. A slight insinuation to the contrary, if you remember, was one of the articles of Lord Somers's Impeachment: though probably had it been attempted to prove the Allegation, it might have turned out that he meant no more by such declaration, than Lord Bacon before him did by his *Jus precarium*, or Right in Curtesy, for which he says there is no remedy at all.

Supposing then that in every case, where there is a right, properly so called, there is likewise a remedy to obtain it (which, I believe, is one of the most

most universal maxims of our legal constitution). The tradesman, in the case put, if he can have no redress at Law, may make his demand in Equity; the buyer will then be put to his answer on oath: if he denies the debt on oath, he may be indicted for Perjury, and the tradesman will then be a witness in a case in some measure his own in point of interest, though, for the Crown, in a course of public justice. But then the admission of him as a witness is extremely consistent with the great principle of Law before insisted on. For the end of this prosecution is not a civil satisfaction, but public punishment: and though by the party's conviction of the crime, the debt in reality is confessed, yet the evidence of the seller, to support the conviction, is not under that bias as it would be if the discharge of the debt was the consequence of it; for he will then lose his debt, and the punishment for the crime will be his only satisfaction. But the seller in the mean time has many chances in his favour, which the strictness of Law did not allow him: the debt may be decreed in his favour, or if it is so flatly denied that no decree can be made, he has the chance of a dishonest man's being driven in time to a confession by the terror of an infamous punishment; and so avoiding the prosecution by paying the debt. I have reasoned this case you have put more fully, because indeed I have heard the Law arraigned in this instance: and the case if it should happen, in all its circumstances, would be an hard one, though, I think, with the most ordinary caution, it rarely will.

P O L I C R I T E S.

§. 45. I own you have some time ago exhausted my own cavils against our Law, and the general
course

course of Practice : but, perhaps, there yet remain some disputable points which will be ever urged from without doors ; and though to you, or myself, they are mere phantoms, yet, to a great part of the world, they are of those stubborn kind of spirits which it is not so easy to lay as it is to raise.

In two words, they arise from *the Delay* and *the Expence* of the Law. As to the first, by which a suit has been contrived to go for several successive generations, it reminds one of the Giant of Sirius's account to the Dwarf of Saturn, in Voltaire, of the Process of a Law-suit in his country commonly lasting 250 years : but then it must be remembered, the Beings in our Planet have a duration of life more disproportioned to the length of a Law-suit, than the Hero of Micromegas had.

And then the expence itself has commonly such a sting, independent of the delay of a cause, that it is thought if the Poor have a right, whatever becomes of the maxim, that every right has a remedy, the Poor not being in a condition to assert their right, must give it up. And as the Poor must in such a case lose their right, by not asserting it, others are in danger of becoming Poor, even by asserting it with success. A victory itself proving the sure cause of their ruin ; revenge is death ; two contending Spirits in a Law-suit, like Virgil's Bees,

Animas in vulnere ponunt.

Many a Plaintiff, I doubt not, is obliged, like Tom Touchy in the Spectator, to sell the field, after having recovered in an Action of Trespas for breaking the hedge that inclosed it. Not to mention, that in every case the real costs out of pocket will

will greatly exceed the costs allowed by the Court to the party who succeeds in the suit.

EUNOMUS.

§. 46. Those who think dispatch the great excellence of Justice, will doubtless admire the quickness of a Turkish suit; and be inclined to prefer the determination of a Cadi (such an one as Shaw and Norden have described) to the administration of Justice in their own country. The speediness, as well as severity, of Justice in Turkey, is said to be openly avowed on this principle, *that it is better two innocent men should die than one guilty live.* As we glory in adopting the very reverse of this principle, a greater caution in conformity to the principle will necessarily produce a greater length in the enquiry.

This apology for delay, arising from compassion, will, I trust, sufficiently vindicate the formality required in our criminal proceedings: and if the delay here was greater than it is, it might still be vindicated on the same principle,

Nam de morte hominis nulla est cunctatio longa.

But it will be said, the principle is not at all applicable to the course of civil Justice, where the delay pinches most: and in general, I believe, there are many who have lived all their time in England, that have as little idea of a "Hearing being put off till next Term," as the Czar Peter had, when he was told the Prosecution for insulting his Ambassador was so deferred. But let us answer those who will hear an answer, by considering for a moment, to what the delays are unavoidably

voidably owing ; and whether there is not less to complain of on this head now than formerly.

We must go pretty far back to trace the original of the slow and steady pace with which we are obliged to travel through Westminster-Hall : at least the two causes that strike me as affording the most obvious solution of the difficulty are of a very ancient date, if they are not beyond the reach of Chronology. I think, in general, the delay is to be imputed to the institution of Terms, and the general condition of the kingdom in early times : the latter cause assigned is indeed comprehensive enough to take in the other. For the distance of these stated intervals for business may be very well accounted for from a view of the former condition of this country and its inhabitants. The institution of Terms, it appears from Sir Henry Spelman, was partly owing to the Religion of the times, which was not without a considerable mixture of superstition ; and this was the occasion of shutting up the Courts of Justice all the time, but the summer vacation, which was governed by a consideration of harvest. The Vacations were considered in a religious view as the seasons of " true peace : " the vera pax being, I think, used in our old laws in this sense as synonymous to Pax Dei et Ecclesiæ, in opposition to Pax Regis, or the Peace of the Realm.

But the situation of the country itself very well justified the intervals prescribed for Returns of Writs, from whatever motives they originally flowed. Reflect only upon the difficulty of travelling from the extreme bad state of the roads ; no posts then instituted by which Process might be dispatched ; the Process itself all literally written ; now they are *writs* rather in name than in reality ;
the

the common forms being printed with blanks, which are occasionally filled up.

Consider all this, and many other circumstances, which will occur upon a more careful recollection, and rather than blame the delay of the Law at those times, you will wonder with Sir Thomas Smith, "that three Tribunals in one City, in less than a third-part of the year, should rectify the wrongs of so large and populous a nation as this of England!"

And as it was not in itself in those times considered as so great a grievance, much less was it from comparison with the practice of other countries. Fortescue (if you remember) who was much in France, allowed us to have been much more expeditious in our proceedings than the Courts were there; though the course of Justice under an absolute monarchy in its nature must be less interrupted with the delays of form than it is in a free country. The delay now (at least with regard to the Practice of Courts) is much less than ever it was; one most certainly, though not the most considerable of our obligations to the present administration of legal Justice! How far it is yet capable of being further reduced, must be left to time and experience, rather than be hastily decided by an unripe theory, which in prospect of some imaginary improvements, may unawares strike deep on the very roots of the constitution.

§. 47. In the article of expence, I am afraid, you insinuated much more than you can support in point of argument. At least, I will say, if Poverty was a bar to Justice, the most golden clause in Magna Charta would be a dead letter: *Nulli vendemus, nulli negabimus Justitiam* would not be the voice of the Law, if the Law in its administration of Justice made the least imaginable distinction between

tween Rich and Poor. I know of no case where Poverty is under an exemption or under an incapacity with respect to natural rights: if it was under the latter, it would be hard indeed it should not avail itself of the former.

1. No real Poverty however is an excuse for the commission of theft, or any other crime, in this, as it is in some countries; because in England the case of extreme necessity is not supposed to exist: nor indeed can it be supposed consistent with the provisions made by Law for the Poor, independent of other public or private contributions.

2, Nor is real absolute Poverty a permanent confinement even for just steps in every case; though such a confinement is not contrary to natural Law, however it might in some cases be not agreeable to humanity. In proof of which I need only remind you of the Laws particularly interfering to this purpose in the cases of Insolvents and Bankrupts.

The Insolvent and the Bankrupt Laws agree in this, that they are humane expedients to reconcile natural Liberty with natural Justice. The Debtor, who is the object of the one system or the other, is to pay as far as he is really able to the Creditor; and upon that condition is not liable to be perpetually confined by his Creditor. They differ materially in many respects: the one regards only a particular debt, principally a small one, whether the debtor is in trade or not; the other all the debts which a person in trade has contracted.

For this provision of the Bankrupt Laws is founded on a regard to *trade* merely; which as its very being depends on credit, so that credit must often involve the individual who is concerned in trade. There is then a natural compassion due to an insolvent trader. He may innocently fail by his misfortune merely. But, at the same time, there
is

is a compassion due to his creditors ; and as far as he is really able to pay, so far he ought. By the supposition, he cannot pay all his debts ; it is agreeable therefore to good policy and natural justice, that he should divide all his effects among all his creditors. The great hinges then on which the system turns are these, 1. That for the benefit of trade in general, a real trader shall be permitted to regain his liberty, on surrendering all his effects ; and that any concealment of his effects, at the time he would avail himself of this indulgence of the Law, ought to be deemed highly penal ; and from a civil injury to the creditor, to become a crime to the State. 2. That his effects ought to be distributed equally among all his creditors, who prove themselves such : and the equity of this equal distribution is still more apparent, because in consequence of this discharge, no one, who was then a creditor, can molest him for the future, whatever new credit or circumstances he may afterwards acquire in the world.

Two things however I cannot help adding, that it is injurious to trade and to justice to permit one really not a trader to be a Bankrupt : and that though one is discharged as a Bankrupt, and in point of Law a composition passes for payment, yet in point of conscience the obligation to satisfy the whole will revive with the power of doing it.

3. The Spirit of our Law would be humane to the Poor to very little purpose in such instances, if it in any degree deprived them of the means of suing for or defending their own rights. Indeed the constant practice of suing or defending in *forma pauperis*, in any Court in Westminster-Hall, would be an answer to the supposition, if the supposition was not so absurd as to require none.

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As to the expence of Law-suits, it is often aggravated, no doubt, by the extravagance of the parties themselves: but upon general principles admits of a clear vindication.

And a very few words will convince us of this, both as to the allowance of costs in general; and, on the other hand, as to the limitation of that allowance, by making the costs, permitted by the Court in most cases, more or less to fall short of the real expence the party has been at. 1. Costs, in every civil suit, regularly follow the event of the cause. This is highly reasonable in itself, and a great improvement of the antient Law, by which no costs could be had. It is certainly the only way of making it worth while to recover many rights; and, on the other hand, of punishing a vexatious suit, as no action lays for it. But in this latter respect the ancient Law is a little disguised. It amerced a Plaintiff *pro falso clamore*; it required pledges for prosecution; and it amerced a Defendant after verdict. Costs, however, at present are not universal. 1. Certain only on a Judgment obtained in an Action. 2. Discretionary in Motions, at the pleasure of the Court. 3. In criminal Proceedings, generally none at all; tho' here a party wrongfully indicted may reimburse himself by Action. In Informations he has a third part of the fine by privy seal; where the Defendant is not permitted to agree with the Prosecutor. In summary Convictions that are illegal, he has either an action against the Justices, or costs by Act of Parliament. There is one thing that does indeed influence the expence of a suit, which is not properly the act of either party; and that is the expences on suits arising from the tax of the Government, which it may be thought perhaps is a charge unknown to former times; and an enormous weight on civil Justice. To this it may be observed, 1, That
most

most Governments do, in some shape or other, tax Law Proceedings; and he must be a great stranger to the English Law who sets up former times in this respect as a contradiction to the present. In former times, it is well known, real actions were almost the only suits; and in real actions the fine paid to the King upon suing out original writs, was always in proportion to the sum in demand; and bore a much greater proportion to it than the stamp tax does at present. Nay, a fine was paid for compounding suits; and reasonable enough, as one party or the other must have been in the wrong to occasion any suit; and in the end must otherwise have been amerced to the King. And that general practice, on original writs, is the well-known origin of (what are called) the præ-fine and post-fine now paid on levying a fictitious fine, as an assurance of land.

But, 2. The enormity of this charge is in many cases not fairly to be imputed to the Law, but is more properly owing to the prolixity of proceeding: and then it is evident the party or his agents occasion the weight of the burthen they complain of.

And it is this very circumstance of one man, by his extravagance, ignorance, or prolixity, having it in his power to make a suit ten times more expensive than it need be, that makes it absolutely necessary for the Court itself where the cause is depending, to have a check over the party: and by its officers to regulate the proper degree of expence. For why should one man be allowed to be liberal out of another's pocket? The consequence of taxing a bill is, that your antagonist should reimburse you for the necessary expences you have been at in a suit in which the Court has judged his conduct unreasonable. But it would be very unjust,

unjust, that if either side was clear in his conscience either that his antagonist has no defence, or the Defendant that the Plaintiff had no cause of action, yet he should determine to make the suit ten times as expensive as it need be, because he knows the other side is to pay. The practice therefore of taxing costs is reasonable.

§. 48. And now, POLICRITES, as we have pretty well worn out our time, and our subject, as far as conversation will permit, let me ask you, raillery apart, does it not appear that the Law throughout is founded on reason and principle; not perhaps intuitively clear in every case, but easily reconciled to them, if we are but at the pains of a moderate investigation?

POLICRITES.

Not quite so moderate, when it must often be carried far back; and so many obsolete writers must be consulted, who in general have been long consigned over to dust and neglect in the corner of a study. Are not the Year-books, and much older witnesses, such as Bracton and Fleta, now and then called on to prove the antiquity of principles, or to illustrate them by application? And when a witness is himself to speak by an interpreter, in my poor opinion, it adds something to the difficulty of examining his evidence.

EUNOMUS.

Those cases, it is true, will sometimes happen: for this circumstance must ever be attended to, that the Law of England is not only a Law of Reason, but of great Antiquity. This latter circumstance undoubtedly does it great honour as a
positive

positive system; but is often much in its way in other respects, as it tends to obscure many a particular doctrine, the reason of which we may sometimes lose sight of at this day. But then this circumstance, fairly considered, points out its own remedy; the "study of antiquity."

§. 49. In our Profession, as in every other branch of study, an attachment either to antient or modern learning, exclusively of the other, is partial and ill-judged: the one is more immediately for use, where the other is more generally only for entertainment: but though the application is entirely on one side, the illustration must often come from the other.

Any one who was to begin the study of his Profession with the perusal of antient books, would certainly begin at the wrong end. How unprofitable a fatigue would it be to commence our researches with the old doctrines of Attornment, Collateral Warrantys, and such antiquated titles? A student might even endeavour to form an acquaintance with Lord Coke against his own directions. He tells them, they should "first read the later Reports;" and he could not but foresee, that in giving this advice, He, like Aristides, was signing the shell that was to banish himself: for certainly what the year-books were then, Lord Coke in a great measure is now. The very same advice, if I remember right, Grotius gives as to the study of History; and there is the same reason in both cases. We propose in both cases to make our studies useful: and the state of times, laws, and languages, are in such a perpetual flux, that one who confines his attention to the state of things, as they were three or four centuries ago, may be as much a stranger to what is now doing, as Queen Elizabeth, if she was to rise out of her grave, would
be

be at the Council Board ; or Plowden, if he was now to attend at the Bar.

But Lord Coke, who at our first setting out is an advocate for modern Law, would think himself strangely misunderstood, if we were to cite him as an authority for stopping there. He promises no harvest to those who are content to reap in the narrow space of their own age: "out of the old fields," he says, must spring the new corn." And it will at least be an argument *ad verecundiam* in urging the necessity of the study of antiquity to Lawyers, to shew how much even those have thought it so, who themselves were no Lawyers. A book at my elbow has a passage of this kind, which, whether you recollect it or not, I am sure will entertain you ; I will read it.

"I might instance (says Lord Bolingbroke) in other professions, the obligation men lay under of applying themselves to certain parts of History, and I can hardly forbear doing it in that of the Law ; in its nature the noblest and most beneficial to mankind ; in its abuse and debasement the most fordid and pernicious. A Lawyer now is nothing more, I speak of ninety-nine in an hundred at least, to use Tully's words, "*Nisi leguleius quidam cautus, et acutus præco actionum, cantor formularum, auceps syllabarum.*" But there have been Lawyers that were Orators, Philosophers, Historians: there have been Bacons and Clarendons, my Lord. There will be none such any more, 'till in some better age, true ambition, or the love of fame, prevails over avarice: and till men find leisure and convenience to prepare themselves for the exercise of this profession by climbing up to the vantage ground, so my Lord Bacon calls it, of Science, instead of groveling all their lives below in a mean

“ mean but gainful application to all the little arts
 “ of chicane. Till this happens, the Profession of
 “ the Law will scarce deserve to be ranked among
 “ the learned Professions: and whenever it hap-
 “ pens, one of the vantage grounds to which men
 “ must climb is metaphysical, and the other histo-
 “ rical knowledge: they must pry into the secret
 “ recesses of the human heart; and become well
 “ acquainted with the whole moral world, that
 “ they may discover the abstract reason of all
 “ Laws: and they must trace the Laws of parti-
 “ cular States, especially of their own, from the
 “ first rough sketches to the more perfect draughts;
 “ from the first causes or occasions that produced
 “ them, through all the effects, good and bad,
 “ that they produced.” What think you of all
 this?

POLICRITES.

————— Si sic
 Omnia dixisset ———

He might, in a nobler sense, *still* have been “ *John the Saint* *.” Though I do not think, by-the-
 bye, that his own times were so barren of exam-
 ples as he represents them. In that respect he ra-
 ther deserves the censure that has been cast by Dr.
 Middleton upon Virgil, for transferring elsewhere
 the palm of Eloquence and the laurels of fame,
 which never flourished more than in his own coun-
 try, and in his own age. And I cannot but ob-
 serve, that the noble Lord, notwithstanding the
 spirit and force of his style, has copied his rant

* Alluding to Prior's tale of Earl Robert's Mice;

————— estoons the Lord

Of *Boiling*, whilome *John the Saint* ———
 and to the general character of his Philosophical Writings.

much better than he has applied it. Instead of degrading his own times by the application, he might from those instances to the contrary in the profession (the *Somers's*, the *Hotts*, and the *Harcourts*) whom he did know, have been taught to think, or at least to speak, with more modesty and candour of the *ninety-nine* whom he did not know. His notion however, in a liberal view, is highly commendable: it is right that a Lawyer, on proper occasions, should put on the Historian and Philosopher.

E U N O M U S.

§. 50. The dress is certainly becoming, though it is not always to be worn in public: but neither is the habit of the Profession. Our Terms and Vacations do perhaps, beyond any other employment, mark out intervals of hurry and retreat, of business and amusement. Our studies, more than any other, connected with the antient and modern world. Consider only as to the knowledge of antiquity, how much is done to our hands in the elaborate researches of Selden, Spelman, Dugdale, N. Bacon, and Madox: more particularly by those Writers who have connected ancient and modern learning; who have with great pains pointed out on any particular subject what the Law originally was, and in the room of which the modern is substituted. Such is Lord Hale, particularly in his History of the Law, and Preface to Rolle's Abridgment: such are Serjeant Hawkins in his Abridgment of Littleton and its Comment; and Sir Martin Wright in his History and Application of the Feudal Tenures.

§. 51. But leaving such matters of antiquity as are of a higher nature, and which point out their
own

own consequence, how much of amusement is to be met with even from this quarter? In the history of the profession, its seats of residence, its various degrees of dignity, its diversions as well as its discipline?

There are traces yet visible that shew many particulars, with regard to our Profession, are of an ecclesiastical origin. The Coif is agreed to be the invention of the Clergy to disguise their Tonfure when prohibited to practise in the Temporal Courts; our Bands, our Habits, and general tenor of our Dress, though till the time of Charles the Second, they varied much, (as appears from comparing old Histories and Prints,) seem to proclaim the same original. The old Books seemed to have almost included Westminster-Hall itself within the pale of the Church. For instance; when they caution pleaders against too nice and technical conclusions in forming issues, that are to be tried by a Jury, they do it "because the *Lay-people*," they say, (meaning the Jury) "will not understand it." And Mr. Madox tells you, the Lord Chancellor was for a long time the King's *Chief-Chaplain*, and had the superior care of his Chapel, as well as of his Chancery. And the general and extended denomination of *Clerks* to the Deputies in Law-Offices, and thence, by degrees, to all Offices whatever, are plainly owing to the circumstances of our Law-Offices having been originally, and for a long time, filled by some of the Clergy. That, in particular, the Six Clerks in Chancery were of the the Clergy, is acknowledged on all hands; and it appears from the Parliament Rolls of 4 Ed. III. that the Lord Chancellor used to give the benefices under a certain value, the patronage whereof is in the Crown, "to the Clerks in Chancery, who had long laboured in that place."

And hence, though nearly on the eve of the Reformation, the Statute of Hen. VIII. was made to enable them to marry; because tho' the office was then chiefly filled by Laymen, yet the Clergy were not disabled from holding these offices, any more than the highest office in Chancery. Not but in this latter case, usage, which began soon after this time, concurring with the extended and more difficult jurisdiction of the Court, requiring an education in this track, pretty well established the common Lawyers in the important trust of the custody of the great seal.

§. 52. And this connection of the Profession of the Law with the Church, does perhaps in part account for the Law itself having for some time no fixed residence for its Professors. That 'till within our time there was in point of education no connection between the common Law and the Universities seems pretty evident: and our Profession (though it has been abundantly made up to it since) had reason to lament, that every science, but the municipal Law, was taught there. The Law, in the earliest times of which we have any notice, Lord Coke says, and other authorities besides a Record in 19 Hen. III. warrant him in saying, was taught in London by learned men of the Law, who set up schools for that purpose. For Selden tells us, that before the reign of King Stephen, the municipal Laws were taught in the monasteries, in families of greater distinction, and, he adds, "in Academiis, Collegiis, Alibique." But I know no evidence of history to explain the latter words as they have been understood to mean our two Universities. The inference from such historical accounts as we have is rather to the contrary. The words "in Academiis et Collegiis," are equivocal, and do not necessarily import our Universities,

Universities, properly so called. The very schools, mentioned from the Record of Hen. III. will bear the term : and Fortescue and Lord Coke, though they both allow the Universities of Oxford and Cambridge were strangers to the study of our Law, do yet call the Inns of Court and Chancery by the very terms of " University and Colleges."

It seems to me not improbable, that the abolition of the Law Schools, by the prohibition that issued 19 Hen. III. might in part give occasion to a more regular course of institution, and fix the places of residence that we enjoy at this very day. The Temple, which was the earliest of them, appears to have been first applied to this purpose in Edward the Second's time. I leave the particular history of these noble seats of learning to the elaborate Antiquaries who have obliged the world upon this subject; particularly Fortescue, Lord Coke, and Dugdale, with some dissertations of this kind read before the first Antiquary Society, and collected by Mr. Hearne. And I am not without hopes that the learned Body of that name *now subsisting* will in time permit these subjects to have some share in their curious researches.

There are some circumstances however respecting their situation and establishment I cannot altogether pass over. They seem to have been fixed in this spot, to be as much as could be in the center of the town, and yet out of the noise and hurry of it. And it must be owned their situation is admirably calculated, with this mixed view. They are at this day between the Cities of London and Westminster; and by their squares, courts, and spacious buildings, answer very well the various purposes of health, study, business and retirement. You may think perhaps they should have been nearer Westminster-Hall, the great field of practice;

practice ; and that their situation does not justify what (I said) was one end of fixing it, to be as near as could be in the center of the town. The times in which the Inns of Court were established will answer both objections. If we view London as the map exhibits it even in Queen Elizabeth's time, it will from thence appear, that noblemen's houses occupied all the intermediate space between Westminster-Hall and the extremity of the City. But could the Inns of Court have been fixed nearer the Hall, they would only have accommodated the Profession in one respect, and too much at the expence of every other convenience. After this slight observation on the convenience, reflect a moment on the delightfulness and the dignity of the situation. Two of them on the Bank of the River ; and in those days the whole bank from the Temple to Westminster lined with palaces of the King and some of the first Noblemen of the kingdom : what the other two wanted in the view of the River, they made up in the extent of their Gardens.

Those writers who have called the Inns of Court and of Chancery by the name of an University, do by no means degrade the term according to its more genuine and strict acceptation. In the first place, the number of distinct houses (comprehending those of the Inns of Court and of Chancery, the latter of which are in subordination to the former) are not much less than the number of Colleges. But many internal circumstances will much better support the analogy those writers conceived between them. It is easy in many particulars to run a parallel between the Inns of Court and the Universities.

They

They agree in each having several degrees to be taken by the Professors of their respective sciences; in various exercises required as qualifications for those degrees; and in the original institution of public lectures; though a disuse of these in the Law Societies has long made a breach in that part of the Parallel. By the Law lectures alluded to, I mean those readings on Statutes that have been in ancient times so great a channel of legal instruction, were delivered with so much pomp and grandeur, and derived so great an authority: of which the reading on the Statute of Uses is a sufficient instance.

The internal government too is, as to its nature and institution, as perfect here as in Colleges; the Treasurer and Benchers having the same power over the members, by "the orders of the houses," as the Master and Fellows have by the Statutes of a College. If any thing, their domestic policy, tho' under an Aristocratical form, is more extensive within the walls than it is in Colleges; because the *Bench* unite the legislative and the executive power over their Societies: as they not only execute orders in being; but can vary their orders or laws as occasion requires. Our Inns differ from Colleges as being possessed (I think) of no estates, exclusive of their own and the subordinate houses; their public incomes arising from fees on admittance of Members, and on taking degrees; from fines, in nature of penalties, for not doing exercise or paying dues; and from the profits of Chambers.

§. 53. The degrees I mentioned in our profession are those of Serjeant at Law, Benchers, and Utter-Barrister. The editor of Sir H. Spelman's work seems not quite so accurate in his manner of classing

classing them : he reckons (if I remember right) *in foro regni*, in contradistinction from the *foro civili*, the degrees of Serjeant, Apprentice, and Barrister. But an Apprentice distinguished from a Barrister, and whom he places higher, never could be considered as a graduate, but a mere student.

That of Serjeant he has rightly placed as the highest degree of the Law, and of which no time traces the origin. Its history opens a large field of enquiry : at present it is sufficient to observe, that the antient splendor of this "state and degree" (as the writ always styles it) may be judged of from many circumstances attending it at this day, but is more evident from others now obsolete. The antient manner of taking this degree still retained ; the precedence those, who took it, so long had of the rest of the bar ; their power of taking fines, and of sitting in circuit commissions, as Judges ; the necessity of still taking this degree as a qualification for that Bench, added to a former circumstance of the Bench being rarely filled but by those who had for some time enjoyed this degree ; all taken together tend to shew this order is a very antient, honourable, and vital part of our legal Constitution.

The editor of Spelman has not stopped to explain either of the other degrees : nor has Dugdale, though he has collected copious materials respecting both, been at the pains of sufficiently settling the nature of either. The term itself however will serve to distinguish a Bencher from a mere Barrister. But the confusion arising from calling the latter more generally an Utter-barrister, without any explication of the term, has introduced much perplexity on this subject. And as I mean to read to you (what I have collected, in a very small compass)

pass) some of the particulars that Dugdale has so widely diffused about the qualification, and standing for the Bar, I shall be excused in going a little out of the way to explain the term itself.

Dugdale, instead of defining what is meant by "Utter-barristers," copies Lord Coke, who says, that out of Mootmen, after eight years study or thereabouts, are chosen Utter-barristers, that is, are called to the bar; though, as I said, he does not account for the etymology of the term.

Neither does Cowell, whose definition however, as it is supported by the facts I shall after mention, is worth reading to you: "Utter-barristers (he says) are such as, for their long study and great industry bestowed on the knowledge of the Common Law, are called out of their contemplation to practice, and in the face of the world to take upon them the protection and defence of clients. These are in other countries called *Licentiati in Jure*; howbeit, in modesty, they still continue *themselves bearers for divers years*, like the Scholars of Pythagoras, that for the first five years never adventured to reason or discourse openly upon any point of their Master's doctrine."

Blount (who wrote in Charles the Second's time, about the year 1670), in his exposition of the term Utter-barrister, copies Cowell, in the passage I have read, as far as "*Licentiati in Jure*;" he fixes the period of calling to the bar at seven years; but says nothing of the silence either enjoined or practised after being called: though it appears by the old orders made in James the First's time, and continued till after the publication of his book, that such silence was in fact then enjoined. After mentioning exercises, usual before and after being called,

called, he adds, " They are called Utter-barristers, " that is, Pleaders without the Bar, to distinguish " them from Benchers, or those who have been " Readers ; who are sometimes admitted to plead " within the Bar, as the King, Queen, or Princes " Council are."

Having thus, as I take it, shewed, that Utter-barristers, and Barristers simply so called, are in reality the same ; I shall now perform my promise in reducing into a very narrow compass what Dugdale has inserted a great number of particulars to shew, *viz.* what standing and what orders have been made, and what qualifications have been required for the standing at the Bar. I do it with a view of commending in the best manner, that is, from comparison, the last order made for this purpose ; which, after reading to you such conclusions as I had formerly drawn from Dugdale, you will much better understand and approve.

1. It appears that orders and regulations have from time to time been made with respect to the qualifications required for being called to the Bar ; sometimes by the respective houses themselves, in which each judged for itself, and no uniform rule was observed ; sometimes regulations were prescribed by the Judges for the common direction of all the Inns of Court ; and sometimes by command of the King or Queen, with the advice of the Privy Council and Judges ; as was the usual practice during the reigns of King James I. King Charles I. and King Charles II. But no instance till the other day (in print at least) appears of a voluntary and uniform concurrence of all the Inns of Court to establish one common set of regulations, which, well considered, reflects great honour on the present establishment.

2. The

2. The qualification in point of standing for the Bar, has been very different at different times. At one time, in the Middle Temple, it was twelve years; by many public orders no time was limited; but under a general description of "convenient continuance," as in 36 Eliz. and 12 Jac. I. By later orders it seems to have been fixed to seven years continuance, as 16 Car. II. so in 38 Eliz. In the intermediate periods, where the time was fixed, it seemed to be "at eight years," as in 6 Car. I. and in the Middle Temple 16 Car. I.

3. It appears, that whatever qualification in point of standing was necessary in order to be called to the Bar, it was a constant rule to restrain for some time the practice at the Bar. At Gray's Inn, 13 Eliz. no Utter-barrister was to come for five years. By a general order, 3 and 4 Philip and Mary, no Utter-barrister should come to any Bar at Westminster under ten years continuance (tho' the meaning of that order seems a little doubtful). In 16 Eliz. 1574, it was five years. In 12 Jac. I. 6 Car. I. and 16 Car. II. it was reduced to three years after the call.

4. Some persons have entirely been excluded from being called to the Bar. It seems that those who had practised, were by these orders under a perpetual incapacity of being admitted into any of the Inns of Court; and therefore under a perpetual disability of being called to the Bar. The present order, in proposing a limitation, seems to be much more liberal, and more for the general good than an absolute exclusion. In 1 Jac. I. by a very solemn order (signed by Lord Coke, Lord Bacon, and others) it was required as a qualification, and made perpetual in its terms, that nobody should
be

be admitted into the Inns of Court *that was not a gentleman by descent.*

5. To avoid these several orders being dispensed with by letters, corruption, or reward, particular clauses (as in 36 Eliz.) as well as standing orders, made it expulsion in the Reader who called, and in the person who was called to the Bar.

6. Many orders restrained the number of persons to be called at any certain time; notwithstanding the other personal qualifications were complied with. And then it was a constant insertion in several orders, with a preamble declaring the reasons of such an order. The 38 Eliz. §. 4. is singular in this respect; for when it limits the number to be called, it directs the preference, *cæteris paribus*, to be given to those who most excelled in morals and literature; which circumstance indeed one would imagine afforded the true spirit of the other orders, while a limitation continued, though no such preference was inserted.

If it was asked, what is the general *utility* of regulations of this kind; and what in particular the *necessity* of them at this time? It might be observed, the number of Lawyers, as well as Laws in England, are supposed to exceed those of any other age or country. The Roman Laws, though greatly exceeding the system of Grecian Laws, had scarce any regulations as to the Lawyers in the age of the Republic. In the latter ages the number increased, and some qualifications were required. They could not be Advocates under seventeen years; they were examined before they were admitted as Advocates; and they had their various degrees. In the Athenian State, Orators or public Speakers (for Lawyers distinguished merely as such seem to have been of little regard) were to be thirty years old,

old, unexceptionable in their moral character, and guarded in their behaviour as Orators, though only finable if not so; but no previous test of their abilities was required.

In England, our great and increasing body of Laws, though not so much to be lamented in itself, if it is in a great measure the consequence of freedom, is however a great argument in this case of the necessity of a well-regulated Profession requiring proper tests from its candidates. All your objections to Pleading and Conveyancing prove it. How ridiculous indeed to think an ordinary trade should require seven years apprenticeship, and a profession so extensive as in its turn to consult the affairs of all mankind, should require no preparation at all!

The present times perhaps require at least as much check as the past; because proceedings are now all in English; and any one might otherwise be called to the Bar without any previous study or qualification. But on the other hand, where there has been a learned education, completed at the University, and which happily for this age is the prevailing mode, much less time and application will ripen the mind for the Bar. I think both these circumstances are well attended to in the last order of 1762.

Thus you see have our ancestors taken the greatest pains to secure the knowledge and purity of the Profession, as well by way of education as conduct, through every stage. They could not take too much pains in this point, if we consider the character itself, as Tully has done; though I think it may be said with more truth in England, than it ever could be of old in Rome, *Juris-consulti domus totius est oraculum civitatis*.

§. 54. Our ancestors too, partly I suppose by way of indulgence and relaxation of younger minds, from the severity of a dry study, and partly to give the world a proof of their splendor and hospitality, chequered discipline with diversion; and with the weightier matters of the Law would mix the amusement and gaiety of the times. Not to repeat what Dugdale has collected of the expence and solemnity of the Christmas and Readers Feasts, kept within the walls of the Inns of Court; the *antique Masques and Revelries*, introduced upon extraordinary occasions, as to the grandeur of the preparations, the dignity of the performers, and of the spectators, at which our Kings and Queens have condescended to be so often present, seem to have exceeded every public exhibition of the kind. Here too Dugdale has not been wanting in the pains he has taken to inform us; and some farther materials are furnished by Lord Clarendon and Sir Bulstrode Whitlock.

Our judgment on matters of antient story is too apt to take a tincture from the manners of the age in which we live; and then, if they happen widely to differ from our own, they must in this light appear deformed and ridiculous. This observation will sufficiently account for the profusion of railery, our Poets have thrown on the particular diversions now before us.

Our veneration for antiquity, however, has at length, at a proper period, given way to good sense, which can never well consist with a scrupulous adherence to matters in themselves of the most perfect indifference, and quite contrary to the spirit and general practice of the times. The Masques and Revels were not ridiculous as used by our ancestors. but would be so if kept up now;
because

because the diversions (which must always conform to the humour of the age) are as different now from what they were a century or two back, as the language, the dress, and general prevailing manners of those times, are from the present.

§. 55. And now after all, my dear Friend, what is there in the view we have taken that is really formidable? much less than the *twenty years lucubrations* of Fortescue, or the *six hours a day* of Lord Coke, will enable us to acquire those principles of legal knowledge, that are necessary in every branch of the Profession. To what degree they are to be applied is left for ourselves to determine. We may expand or contract the sail as the wind favours or is against us in our course. And though it will be said very few of the innumerable adventurers who embark with a design of crossing this troubled ocean, do arrive at their wished-for port after a successful voyage; do we not often, in the mean time, attribute to ill success, what may perhaps as often be imputed to ill management?

Sometimes we take no pains at all: at other times we begin; but a sudden indolence, like a mist before our eyes, makes the difficulties that lie in the way appear so formidable, that the conquest necessary to our progress is too soon despaired of: and we give up this path to Fame as inaccessible. Very often impatience is our principal obstruction: we look at the top of the hill, without considering that to get there we must begin at the bottom: and that the higher it stands, the finer prospect indeed it will command, but the longer or the steeper will be the ascent.

Of the two extremes, presumption of success in an attempt (if it goes no farther than ourselves) seems more eligible than despondence; and the
reason

reason of it I can not explain more forcibly than in Virgil's words,

——— "*possunt, quia posse videntur.*"

There is certainly this to be said in its favour, that those who doubt of success in any undertaking, will not exert their strength so much as those who are confident of it: and therefore, as far as want of success may justly, as it often may, be imputed to an undue exertion of the means in our own power, so far the want of confidence may be the occasion of ill success.

In this lottery, POLICRITES, (for the world at large, as to the influence of chance, or, to speak more properly, unforeseen causes on the fortunes and conditions of men, is itself a kind of lottery) the number of great prizes will ever bear a small proportion to the number of competitors. You, or any of your cotemporaries, may or may not in the end have the very prize on which you fixed your eye at the outset: but can he ever have it who takes his ticket out of the wheel before the prize is likely to be drawn? For our comfort, however, in this lottery of the Profession, there are comparatively but few blanks, if indeed there are strictly any. The time and labour we employ, which may be considered as the price of our tickets, must always produce useful knowledge; tho' the knowledge that is acquired may not be attended with the profit or eminence that we expected.

§. 56. I cannot give a stronger recommendation of all I have been saying, than in the account of a neighbour of mine, who is just come into the country, whom I have thoughts of calling on this afternoon; and as I wish you to go with me, I will

will endeavour to give you a general notion of his character.

He is now turned of fifty; and after having been long engaged in the first business of the Profession, in which the world has been an ample witness of his abilities and integrity, he has secured an honourable retreat, at the very time one would most wish to enjoy it: and having declined higher honours, rather than missed of them, passes the remainder of his days with the perfection of his faculties, in a quiet rural solitude. A retreat in life of this kind, reminds one of Longinus's admirable comparison of Homer's *Odyssæy* to the *setting sun*: the picture of which seems to have been copied (or at least is as happily imagined) by Prior*, who describes that sun with

" Its beams extinct, its fierceness lost."

Agreeably to the criticks idea, there must ever be a great affinity between composition at any age, and the general character of the age itself. The fire of youth, and the calm of advanced life, will each in their turn give the prevailing cast to morals as well as writings. The person I am describing resembles, in the tenor of his manner and conversation, the evening of a fine day; exhibiting a clear serene light without dazzling the eye. True greatness will shew itself as much in retirement as in action; at least to the few, who are capable of judging of it, though the world at large may think otherwise, or overlook it. A quick succession has almost worn my friend's memory out of Westminster-Hall; which circumstance, He, as a wise man, only laughs at, as a seasonable check to the vanity

* Looking Glass.

of those who think to be remembered by posterity at a hundred years distance.

He is blessed with a family whom he has educated in every accomplishment suitable to his fortune and station; and his example (which is always the best part of education) has inspired them with a regularity of conduct, and a harmony of temper equal to his own. He still shews his regard to his Profession by breeding up his eldest son to it. His notions in this respect, however, are something singular. I have often heard him say, it would be well if every gentleman of fortune had some insight into the knowledge of the Profession of the Law; which he would find the use of as a necessary part of education: as it would best enable him to understand the history and constitution of his country; would teach him best to manage his own concerns, without too much reliance on others; and would enable him to act with ease and credit on many of those occasions in life, where every man of rank ought to have some degree of legal apprehension, and without which he will be miserably embarrassed, whether he was called upon as a juryman, an Executor, a Trustee, a Justice of Peace, or in the highest character, that of a Legislator.

He used to add, however, that He would never breed up a son of his for the Profession, if he could not leave him a competence independent of it; because he doubted much whether he could thrive in it at all events, without sometimes sacrificing more of his honour and conscience, than a man of any delicacy would wish for. He used to say, there was no employment where there are more temptations to act with latitude than in this. This notion of his, though singular, and not altogether, I conceive, well founded, may be accounted for
from

from a great degree of natural modesty in himself, which, in reality, was a greater obstacle to him than he knew of. And he remains an extraordinary instance to shew, that great abilities, without some little ambition, will never reach the higher stations of eminence: but he is at the same time an instance to shew, that such abilities, joined with such moderation, can ensure a happiness that is very rarely to be had, though the utmost heights of ambition should be attained. To conclude this sketch of that excellent person; He still acts as a Lawyer in giving friendly advice to his neighbours; and they, on the other hand, are well satisfied with his advice; and, at his interposition, often part friends with one another, though they met with an aversion great enough to spirit up a prosecution. These are some of the principal out-lines of his character, that have some resemblance, I believe, as far as they go; but are by no means full enough to be a just portait. You will much better finish it yourself from his company and conversation, to which I will introduce you.

to a great degree of natural modesty in himself, in reality, was a greater obstacle to him than he knew of. And he remains so extraordinary instance to show, that great abilities, without such little ambition, will never reach the higher ranks of eminence; but he is at the same time an instance to show, that such abilities, joined with a moderation, can ensure a progress that is very rarely to be met, though the mind itself be of a nature that should be attained. To conclude this series of that excellent person: he will act as a law, in giving freely advice to his neighbours; and they, on the other hand, will be satisfied with his advice; and, at his interposition, often part friends with one another, though they meet with an aversion great enough to split up a party. There are some of the principal outlines of his character, that have some resemblance, I believe, as far as the good part are, to means fall enough to be a just portrait. You will much better find it yourself from his company and conversation, to which I will introduce you.

E U N O M U S.

D I A L O G U E III.

Il y une nation dans le monde qui a pour objet direct de sa Constitution la liberté politique. Nous allons examiner les principes sur lesquels elle la fonde. S'ils sont bons, la Liberté y paroitra comme dans un miroir.

ESPRIT DES LOIX, l. II. c. 5.

E U M O S

D I A L O G U E

IN TWO PARTS. THE FIRST PART CONTAINS THE
DIALOGUE BETWEEN THE AUTHOR AND A FRIEND
ON THE SUBJECT OF THE HISTORY OF THE
CITY OF LONDON.

THE SECOND PART CONTAINS THE
DIALOGUE BETWEEN THE AUTHOR AND A FRIEND
ON THE SUBJECT OF THE HISTORY OF THE
CITY OF LONDON.

EUNOMUS.

DIALOGUE III.

§. 1. **I**T was late in the evening before Policrites returned with Eunomus from the visit proposed. What with seeing the improvements their neighbour had made in his walks, and what with the variety of conversation within doors, the time passed away insensibly; and it was late enough for Policrites to be at home, at a time when he had not set out for it. In these circumstances Eunomus, who was never better pleased than when the convenience of his Friends gave him an opportunity of obliging them, easily prevailed with him to stay at his house that night: particularly as he was every minute expecting a friend on a visit to him for a few days, who was very lately returned from abroad after three years absence; and who had sufficiently gleaned the curiosities of Italy, during his stay there, to be entertaining in the description of his travels.

Before Policrites could well accept of the invitation made by Eunomus, Philander (for that was the stranger's name) appeared in the court-yard. The eagerness of communicating and hearing accounts of persons and places filled up the conversation during the remainder of that evening; and by the aid of fancy and description they visited the

Grotto

Grotto of Paufilippo, and Virgil's Tomb; they expatiated on the antiquities, the arts, and the natural beauties of several scenes; the verdure, fertility, and richness of the plain of Lombardy; the delightful lake of Geneva, at once charming the eye with the beauty of its water and its banks, contrasted with the perpetual winter of the Savoy side, and the immensely varied culture and population of Switzerland; and the almost enchanted scenery of the Boromean Islands. They could not forget those wonders of nature, the fall of the Rhine and the sinking of the Rhone; that stupendous range of Alps uniting all climates and seasons, the nurse of everlasting snows, the source of mighty Rivers, the Pillars of the sky! nor did they pass over those sublime objects, the Glacieres, Torrents, and Volcanos!

In short they wearied their imagination with dwelling on numberless curiosities, formed by nature and art, or consecrated by story. The next morning when the tea-table was removed, the conversation grew a little more sedate and methodical. They began to consider the inhabitants as well as the cities: and did not pass immediately from Naples to Rome; or talk of the Alps and their various Republics, without remarks on the peculiarities of their manners, laws, and governments.

Eunomus and Policrites, who had never been abroad themselves, could have had very little share in a conversation of this kind, if they had not relieved the fatigue Philander must have undergone from a continued narrative, by intermixing reflections on what they heard, with the same freedom as they occurred.

And though they at first intended nothing more than to pass through Italy by Philander's assistance, yet by a natural progress of thought, like the travelling

velling of Homer's Deities*, they made an easy transition from Italy into Greece; and from the most distant Parts of the East, to the extremities of Denmark or Russia: and from some observations advanced on one side, and questioned on the other, they were insensibly led to a more serious contemplation of Government in general, and that of their own Constitution in particular.

It was that part of the conversation that is here transcribed. I do not exactly remember, what circumstances introduced it, but think it was something in this manner.

I am glad however, (says Eunomus, addressing himself to Philander) your old climate agrees so well with you; and as health is the principal ingredient in happiness, I hope you will not permit the reflection upon your past amusements in other Countries, to break in upon your content at home.

PHILANDER.

I can assure you the reflection upon what I have seen abroad, will upon the whole greatly add to, rather than diminish, my happiness in my present situation. He travels to very little purpose, who brings home only uneasiness at being there: and if England is his home, in my opinion, he closes his remarks with as little judgment as candour, who concludes his description of what he has seen elsewhere, with wishes that he had never left the countries he has described.

* Il. 15. v. 80.

EUNOMUS.

E U N O M U S.

You seem to express yourself "with an heart so entirely English," that I am apt to think you do so, rather to flatter your present company, who have never left this little corner of the globe, than from the real sentiments of a Traveller; at least a preference of this kind, was it to come from us who have made no comparison, might with reason be deemed no better than partiality. There have not been wanting those, and those who have been travellers, and had more right to decide, who have allowed our climate even no natural production of its own. Some (I think) allow us the honour of producing nothing but hips and haws, crabs or blackberries. More agree that our policy, manners, and arts, are either still in many respects in a state of barbarism, or imported from the happier growth of other countries: as if even the conveniencies or the necessaries of life, were as far from perfection in this country, as the Sun is from being vertical; or the

—"Minima contentos nocte Britannos,"

was applicable to our climate only and not at all to our capacity.

P H I L A N D E R.

With more justice (I will venture to assert) England deserves to be remembered among the happiest spots, if it is too much to prefer it; and I will assert this, both as to its climate and manners. Addison, who would spend his Winters in the South of France, and his Springs in Italy, prefers the Summers of England: Bishop Berkeley, who is enraptured

raptured with the vertú, nay with the fruits of Italy, allows he saw no verdure like that of the fields of England: and that lively monarch, who said so many good things, chose no bad topic to recommend his own climate, when he said, "*that was the best, where he could be abroad in the air with pleasure the most days of the year, and the most hours of the day.*" You see I have built upon your concession, perhaps more than you intended, when, because you gave some authority to travellers, I have drawn all my arguments from them. Indeed, whether you was in earnest or not, I can not help thinking competent judges, who have lived in more climates than their own, are more to be credited not only than those who have been confined at home all their days, but (what is most intolerable) than those who would put on them the magisterial air of having seen the world, without any one qualification for the purpose: who have visited foreign countries with an entire ignorance even of the natural face and productions of their own, much more of its Government and Constitution. Can they, to men of sense, be more ridiculous than he would be, who travelled only in his study, and yet would undertake to describe every step from the Via Appia to any Roman Villa, without so much as knowing where the Parliament meets, or the Tower of London stands?

I will not absolutely deny, but that it may, in works of art, be the genius of Englishmen to imitate rather than invent; but then, what they imitate, it is allowed they generally improve. And so, as to our soil, those plants thrive well here, that had their birth in other countries. It is much the same, I suppose, in the great affair of Government and Constitution; and if England from the various intermixture of foreign nations in the
early

early part of its history, has imported the Saxon, Feudal, and other principles of Law or Policy, time has at length so woven them together, that England may challenge the world to produce the like elsewhere. I am sure, if you could give up that fancied happiness, or that amiable enthusiasm (as within certain limits I will allow it to be) of visiting places famous by tradition; those are as happy in other respects, who never leave England. For my own part, and it is from experience I speak, I do not think a mere visit to the Tusculan Villa, or Virgil's tomb, at all more rational or satisfactory than the ridiculous fashion, some centuries past, of making a pilgrimage to Palestine. Besides you have enough to admire as to fame or antiquity in your own island: View the spot where Cæsar landed, or trace Antonine through England. Or without going so far back for your entertainment, review those places renowned as the scenes of the most shining periods in our history; go and idolize Liberty where Magna Charta was passed; or raise in your own mind the departed pomp and magnificence for which the palaces, the monasteries, or tilts and tournaments of ancient times, have made so many places remembered. All these you may view without the hazard of travelling into foreign countries: foreign countries you may visit without hazard in description. Balancing all my adventures together, I had rather have read Addison by my fire-side, than have travelled with him in my Pocket; much more would I chuse to hear Shaw's account of his travels, than to compare the justness of his accounts in the desarts of Arabia. As to the forms of government, I have seen enough to know they are very imperfect elsewhere; I am very happy in the experience of our own, and only wish I knew more of it.

POLICRITES.

POLICRITES.

I should have thought a habit of rambling, like all other habits, would have produced a fondness for itself: and that Philander would have had a great contempt for the kind of vegetable life of us who are fixed to a Profession, and are obliged to spring up, flourish, and decay in the precise spot that nature or custom has placed us in. And rather than a panegyrick on *home*, I should almost have expected from a traveller the imprecation of the Tartars on any one who talked of a settled home. Those Erratic tribes (it is said) have so little idea of settling, that when they are angry with any one, "*they wish he may live in one place, and work like a Russian.*" But though we are obliged to Philander for making us easy by uniting home and happiness, I can not altogether concur with him in condemning all Europe in a lump, as he seems to have done; nor am I in the least able to judge of the advantage our own has on the comparison, unless I knew in what points different States were compared.

PHILANDER.

§. 4. No minute detail in the one case, or exact comparison in the other, is wanting to decide this point. I think, the most general ideas of government will shew us, that those elsewhere are not greatly to be admired, because most of them fall at least much below our notions of good government in the abstract: and the most general description (if it be but true) of our own, will, I am apt to imagine, as best corresponding to our ideas of good government, shew the preference I hinted

was

was not very extravagant or ill-founded. Nor would I decline in proof of my assertion, an undertaking, which perhaps would give us all some trouble; myself in stating what I take this idea of good Government to consist in, and you in attending to me; if Eunomus will engage in the most laborious part of the work, by giving us a general sketch of our own Constitution: after which it will be very easy to see, whether I was right in the notion I advanced.

E U N O M U S.

I shall very readily submit, without an apology, to the terms you have prescribed; I think the subject so interesting, that it can not be considered out of time: and if we do not do it justice now, we shall leave more to be said another time; so that the sooner Philander begins the better.

P H I L A N D E R.

§. 5. From the tenor of my proposals, and the broken precipitate manner in which I take up this subject, you will neither of you expect a nice sketch of any government in particular; much less that I should make use even of my own observations so far as to apply them to the interests of our own Country. This I own is a province politicians should extend to the utmost; but the measures necessary in the cabinet would be ill-timed in conversation. The real power and strength of all states is comparative, and must therefore depend upon a view of others as well as themselves: but we are not now planning conquests, or defending ourselves from invasions. The internal strength of a State is what I am to consider; what characterises it as a
civil

civil society, and what is principally its own : may I explain myself in two words, by saying it is the “moral character” of a state that is now before us?

§. 6. The best original of society that has been given us, is that of *compact*; it in reality is the only one, that corresponds with the condition of men before the existence of society; and is the only reasonable account of men’s ever quitting that condition. Men, independent of society, are naturally equal; their rights are exactly the same: in a genuine state of nature, power and subjection, except in particular cases, do not exist.

Power or authority that exists in a state of nature, must be either usurped, or lawfully acquired. No usurpation, or unjust force, which *ex vi termini* is an invasion of natural right, can be the just origin of civil society.

Power or authority to be acquired justly in a state of nature, may be such as parents have over their children for special purposes; but which, being temporary and limited, can never be the origin of that extensive subjection necessary to government: and indeed has this fundamental defect, that it supposes Men to be Children all their lives, and to live all in one family. Those who have amiably pictured a King as the Father of his People, or compared a Kingdom to a great Family, meant it, I am persuaded, with quite other views. They aimed at recommending parental affection in the Head; and spontaneous filial duty, in opposition to coercive obedience, in the members of society, to confirm the union; by no means to have pointed out parental authority as the origin of that union. I would have left Sir Robert Filmer in quiet possession of so unwarrantable a conceit, if I had not found Sir William Temple in some measure of his party.

party. I will only add, with a view to this last writer, that error is often inconsistent: and when that agreeable author once departed from just solid principles, no wonder he would unawares recur to better notions, and make one part of his essay a contradiction to another.

Another way indeed of acquiring just Power over another in a state of nature, is when one man by his criminal conduct has forfeited his liberty, or perhaps his life, to the person injured. This is the true just origin of slavery. But admitting, the injury was to go in succession; and that the children of the aggressor were born slaves to the party injured; slavery itself (I suppose the worst writers would allow) differs so much from civil subjection; and the slaves or subjects, in such cases, would be so few, that there could be no pretence of founding society in general on this kind of authority.

If then men in a state of nature, that is, persons who are neither children nor slaves, are equal and independent, how is it possible for that equality and independency to be abridged in forming any plan of civil subjection, but by their own free voluntary consent?

§. 7. After this view of society, it will be in vain to argue, that no such commencement of government in fact can be found of all those that have or do exist;—that, not to mention absolute Governments, which (it will be said) are directly in the teeth of this way of arguing, there are whole nations of slaves who have yet their Chiefs, their Kings, and their Warriors.

I say it will be in vain to use such arguments, because they neither conclude any thing, nor apply to the case. As to those who deny any such actual commencement of society, as that of compact, and yet would appeal to fact in support of the opposite assertion,

assertion, I shall only say this by way of answer: till any one fact is advanced on their side, to countenance a notion so contrary to reason, I beg reason may stand its ground. It may be difficult to say from history what was the particular commencement of any government or state whatever; I believe it will be more difficult to find any thing like a civil state commencing by force.

To make tyranny the parent of society, is too bold a fiction even for the poets. Shakespear, in an incident of this kind, has mixed (as he always does) a much greater justness of thinking with admirable humour and invention. He represents the sailor Stephano, in his desert Island*, *forming a kingdom by consent* of the majority, though he supposed but five persons in the island. Speaking to Caliban of Prospero he says,

“ *Steph.* Monster, I will kill this man: his daughter and I,
 “ will be king and queen, save our graces! and *Trinculo* and thy-
 “ self shall be vice-roys. Dost thou like the plot, *Trinculo*?
 “ *Trin.* Excellent. *Stephano*, give me thy hand.”

Then in the fourth act †, we find the government is all settled, and peaceable subjection has taken place. The monster says,

——“ Prithee, my king, be quiet.”

And his other subject says,

“ O king *Stephano*! O peer! O worthy *Stephano*!”

So that instead of the strange origin of government some writers pretend, Shakespear had more propriety than to let even his Monster be governed but by his own consent.

* Tempest, Act 3. Scene 2.

† Scene 5.

If however such writers tell us, absolute governments kept up by force, are well known even at this day, and yet are a greater paradox, if the rise of political union is to be deduced from consent alone; May we not say, the same experience from whence they collect such instances, will go a great way in refuting them? Many Governments are in fact administered often more by tyranny than by Law: But what proof is the actual administration of Government, so different at different times, of its original? Let me add, that even such states, whether European or Asiatic, are rarely without some kind of Laws. Now every Law observed is a negative on absolute power: because (as a wise Antient observed) every Law is a kind of compact, and a security of some right: and obedience to Laws is of itself strong evidence of consent.

Let me add too, the frequent revolutions in such countries may, in one view, be considered as evidence of Government in general being properly founded on consent alone: because they are the strongest marks of public disapprobation that can be given of any Government's abusing natural Liberty; which men never intended to give up, by forming Societies, but to put into better hands. In Governments less absolute, the least imaginable share the people have in making Laws are new proofs of a contract. Are then those innumerable clans of wild Arabs, and untutored Indians, that people the vast deserts of Africa and America, to be complimented with the name of Societies, merely to refute a system, to which they are the only exceptions? or indeed, as far as they have any union, are they properly exceptions to this great origin of Society? Even those uncivilized tribes, in their common intercourse, have their Councils, their Debates, and their formal Alliances
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with one another. All these are the very language of consent; and, as it were, so many contracts in the abstract.

This is my idea of Society, or civil Union in general; it will be no difficult matter, without minutely pursuing the several species we meet with in the world, to say which do or do not answer this great end and origin of Society.

§. 3. Prefixe, and other Historians, tell us, that Henry the Fourth of France entertained a prospect of new settling Europe by dividing it into fifteen States: you will think my division perhaps a little more chimerical, when I propose to consider Governments only in two lights, either as Monarchies or popular Governments. The combinations of these with all their shades and differences are infinite. Mr. Locke, I remember, asserts, There is in reality no such form of Government as absolute Monarchy; no such original constitution as the arbitrary will of a Prince absolutely independent of Law. That in point of fact, there are Governments where the will of a Prince does at least over-rule all Laws, Mr. Locke would hardly deny. He must be understood to suppose a deviation from a form of Government to be a different thing from the original form itself. Montesquieu's whole book is founded on a regard to that difference; and the justness of the observation may be seen by looking one moment at home. You would not I suppose pitch upon the æra of King John, or the milder, at least more artificial, tyranny of Henry the Eighth, as the true representation of our form of Government: they, upon occasions, exercised the regal power in England as absolute as the Turk himself does in Asia.

If indeed there is no such form of Government as an absolute Monarchy; I will venture to add,

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that of a pure Democracy is altogether as ideal; that no Government can possibly be administered, and consequently can exist, without some delegation of the executive power; or some legislative powers vested in representatives of some sort or other. In proof of this I (in my turn) will appeal to the momentary assemblages of the wildest Arabs ever formed under some Captain. There is scarce even a popular insurrection in a State, but what is headed by some chosen leader. I conclude then, as a set of people in forming Society would never give up their Liberty and their Interests to the absolute management of one man; so on the other hand, in order to preserve both with harmony, they must delegate some trust, some management, if not to a single person, yet to a few. It is the quantity of power that is delegated, and the number of persons to whom it is delegated, that form the proper and most simple view of that great variety of Governments that now exist in fact, or are made to exist in the imagination.

§. 9. Having thus considered the origin of Government in the abstract, and the forms of them in the simplest light that is possible, there are other very interesting questions I could wish to set in agitation, if I did not apprehend them too indeterminate in themselves; certainly too copious for an accidental conversation. I mean, what could in reason or probability (for in fact I have all along supposed it almost impossible to) account for the rise of different forms of Government? How much more subtle and refined, though far less interesting as being purely speculative, are those questions in Politics, about "the best form of Government," and the possibility "of universal Monarchy?" I can not however help saying a word or two upon these points.

Whether

Whether some experience of one person in critical junctures at first occasioned greater command and trust to be given him, and afterwards a confidence to be placed in his descendants in succession, by degrees might found an hereditary Monarchy; or whether the necessity of entrusting the execution of great enterprizes to the command of a single person, and that trust, recommended by experience, and at length continued in ordinary affairs, might be the parent of Monarchy in general; I leave you to judge: I shall only add, an elective monarchy, not only as the simplest idea, one must imagine, would obtain in the world before an hereditary monarchy; but monarchy itself seems not to be the first form of Government that society (taking its rise from compact) would naturally fall into. However amiable a form of Government it may be, when qualified as with us; monarchy, in the abstract, is certainly the most remote from the idea of natural equality. For, in the abstract, what can be more opposite than that any set of people, from being all equal in power and authority among themselves, should all unite under the power and authority of a single person? A Democracy, as it has least of the idea of Government in it, seems however to be the first obvious mode of assemblage from a state of nature: it is a society indeed that least infringes on natural liberty, but at the same time, least corrects the abuses of it, which is the end and aim of all societies. A kind of limited Republic seems to be the first and most obvious step to a regular subordination, and society, properly so called: for without subordination, no durable form can subsist. The very name of Government implies it. Besides that the degree of Liberty seems to make a Republic an obvious form of government from a state of nature, when li-
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erty is to be given up: so is it a likely form to be laid hold of, from the impatience of mankind, where liberty has been abused under a monarchy; and that monarchy comes to be dismembered by part of the subjects shaking off their antient subjection, and forming new assemblages of their own. The states of Holland afford a late instance of what I am speaking. The several free states of Italy now existing, originally the fragments of that vast empire that fell to pieces by its own weight, is a more distant but a more striking example of the same thing.

§. 10. As to the great question about the best form of government, less need to be said of it; because it is the duty of subjects under any government, to take things as they find them. You will believe me, when I say from my heart I would not wish in the least degree to alter that I live under, if I could. Besides a perfect government I look upon to be as mere an idea as perfect virtue, or perpetual motion. It is easy enough to have a true general idea of the thing itself, though it may never subsist but in idea. It must be "such an one as will diminish least of natural liberty, and at the same time, best answer the end of society," our own I trust will stand this test. But though I should not pretend to decide which is the best form of government of those that now exist, supposing no one to be entirely perfect; yet I can by no means agree with Mr. Pope when he says, "that which is best administered is best*." The sense commonly affixed to that passage is, that the form

* For forms of government let fools contest;
Whate'er is best administer'd, is best;
For modes of faith let graceless zealots fight;
His can't be wrong, whose life is in the right.

itself is indifferent, the goodness consisting merely in the administration. And if that is the sense of it, I no more agree with him in this, than I do in the other part of the parallel. I allow the mere profession of the best religion without a good life, will be of as little service to mankind, as the best government without a good administration; but to resolve the goodness of the first into mere morality, and of the other into mere administration, is what, I believe, as good Protestants or true Englishmen, we can not so well allow to be a just way of thinking: and if I should observe that Mr. Pope himself had, on another occasion, expressed himself very differently, you will grant, from this instance, that second thoughts may not always be the best. "I am a catholic, (says he, in one of his letters) in the strictest sense of the word; if I was born under an absolute prince, I would be a quiet subject; but I thank God I was not: I have a due sense of the excellence of the British Constitution."

But however, to refute, as well as to censure the other notion, let us, without taking notice of mixed forms, suppose as before, that there are only two kinds of governments, a monarchy and a popular government. These are founded on principles essentially different; and they are perfect in their kind, when the administration of them is in strict conformity to the principles on which they are founded. Suppose then, in these governments, those in power either equally acted up to these principles, or equally departed from them: are the advantages in the one case, and the inconveniences in the latter, in both those forms, entirely equal? In the first case, the public good is the general aim, but it is pursued by different means: and is there no preference as to the means?

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In the latter, there is a general neglect of the public good ; but may not greater opportunities make that neglect more fatal from one quarter than another ? Now this difference of means and of opportunities, if there are such, result, in the case supposed, from the internal principles of the government, and not from the administration : because we have supposed the conformity to or disagreement with the proper principles to be the same in each, and the administration therefore, as to its consequences, can differ only in respect to those original principles.

So that there is some justice due to the question, in fairly stating it : and a question can then only be fairly stated, when essential circumstances are alone compared, those that are accidental being neglected. And thus was the present question stated in the early ages of history, when the dispute was of more consequence than it can be in mere speculation. In that memorable debate preserved (if not invented) by Herodotus, we must own Darius was fair in his manner of stating the proposition, when he asserted " that of the three forms proposed, and each the best of its kind, the best popular government, an oligarchy, or a monarchy, the monarchy was far preferable." I, who will not pretend to decide on this point, shall say nothing more upon this subject, than remind you of the whole passage at length, a master-piece of its kind, and which seems to comprehend all the arguments others have since used on that important subject.

§. 11. But if we were sure of the best form of government ; if not only " the world was all before us where to chuse," but we were to exhaust the imagination, or to realize the fancied draughts of Utopia or Lugnag, in forming this model of perfection ;

perfection; how could we be sure it would last? Government, like natural things, will be ever fluctuating in some degree: it will be pushing on from infancy to maturity, and from thence to decay. It is ever apt to aim at being greater than it is, but can never exceed a certain magnitude. Universal monarchy has been the aim of many States, both antient and modern: the aim has been made with much the same success in the end. It is what no Government will ever arrive at; because "the Balance of Power," its natural check, is as old in speculation and experience, as the thoughts of universal monarchy. For the love of Liberty is at least as strong a passion in the human mind as the love of power; the one constantly endeavouring to restore the natural equality that has been infringed by the other: this principle being like the elasticity of the air, which always increases in proportion to the force that compresses it.

Societies are still, with respect to each other, in a state of nature; and as jealous of liberty and independence, as individuals are: And the protection of as much liberty as is possible, is or should be the end of forming alliances between States, as it was of forming States, by entering into society.

It is pleasant however to see the natural progress of society to enlarge itself; how States have grown by degrees. England, in uniting Wales, Scotland, and Ireland; the Saxons, still further back, reducing the Heptarchy to a Monarchy. It is comparatively but of late that France has united all its Dutchies to the Crown. If from the formation of one entire state by uniting separate tracts of country under the same dominion, we extend our views to the coalition of States themselves; what an amazing progress to power did Spain make, first by the union of Castile and Arragon, and then
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uniting in the person of Charles the fifth Germany and the Netherlands under its own head? Then see, by a terrible reverse of Fortune, those very Netherlands, after an intermediate independence of scarce a century, almost conquered to make up the greatness of Lewis the fourteenth; who, if he had not been obliged to abandon by treaty the union of France and Spain, which he had been so eagerly endeavouring to effect by his arms, would have made very large strides to an overgrown power.

But overgrown power must be its own enemy, as well as that of the rest of the world. Territory in many cases may increase to the diminution of real power: not only because the eye of Government, one may say, can scarce reach, or the arm of Government protect, any very extended territory; but because other neighbouring States will naturally endeavour to reduce a greatness that threatens their ruin; and besides open attacks will sow factions and make use of one part against another. You are both naturalists enough to know that a dissolution will soon take place in any body when the parts of it, by an intestine commotion, are thoroughly disposed to ferment.

England, with respect to its possessions, or its connections with the Continent, was never, since it was first civilized, so strictly an island, as in the reign of Queen Elizabeth: it was never more formidable to Europe; partly indeed from the situation of its neighbours, as well as its own. Our large acquisitions and conquests on the Continent before that time, only kept us in perpetual war, though they might enable us to support it. Our connection within this, and the latter part of the last century, has not, I trust, been productive of the mischief to which the imagination of Party
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has swelled it, but has, in many respects, been of the utmost consequence to England. What becomes of its grandeur in the political system, its commerce abroad, or its true happiness at home, without the most vigilant and active attention to the complicated and jarring interests of the rest of Europe? But I find I am unawares descending to particulars, which I disclaimed at my entrance on this subject; and for fear of usurping on your province, Eunomus, which with some impatience I expect you to assume, I am glad to stop here.

E U N O M U S.

§. 13. That impatience you own, has, give me leave to say, imposed on you, both in making you think you have acquitted yourself of your task, and in the expectations it has formed in you of hearing me. Though you have all along with extreme caution declined giving us any particulars about government, I was in hopes as a traveller you would entertain us with some observations on what all Governments, even according to your own account, must have more or less; I mean the Laws of Society.

P H I L A N D E R.

Impossibilities, my friend, were no part of my scheme: a good French critick says, "*Le Brest étoit découvert pour les Marchands longtems avant que d'être découvert pour les Médecins.*" I may say, very few countries out of Europe are yet discovered for the Lawyers, though the merchants, the Physicians, and the Professors of mechanic as well as liberal arts, have long gleaned from all the world. The truth is, Lawyers rarely travel themselves;

selves; and their stock can be enriched by none but themselves. There have been those who in their travels have picked up a whimsical Law, as they would an extraordinary fossil, or the like: there have been those too, who have collected some scattered discoveries of this kind, of which Montesquieu's book is the only instance worth naming.

I own the Laws of different Countries, if they could be come at, deserve our notice on many accounts; as a very entertaining, I will even venture, though no Lawyer, to say, the noblest study in themselves; being the greatest exertion of natural reason towards the happiness of society. They are useful too, as explaining the history of those nations they belong to; and as connected with one another, or producing others: there being no nation, at least none eminent for civilized institutions, but what in its infancy has borrowed in part from the settled policy of others. Thus Sparta did from Crete, Athens from Egypt, Rome from Greece, and all the world in some measure from Rome.

But it is no wonder that the Laws of other countries are so little known, if we consider, 1. That Laws are a subject which few people are acquainted with. Very few, comparatively speaking, know any thing of those under which they are bred, and of which they daily partake the benefit. 2. Where there are abilities and inclination, there is too often want of opportunity. The knowledge of Laws wants a longer residence, and a more select acquaintance in foreign countries, than what would serve for describing or collecting natural curiosities: they are a subject which, as every body that visits a foreign country can not understand, so every body that lives there can not communicate.

cate. 3. Many countries themselves have no materials of this kind to communicate. Very little Law, I imagine, is to be looked for among the Indians in America, or the States of Barbary.

EUNOMUS.

I find then we are rather to thank you for what you have done, than to expect more: and if so, the best apology I can make for my undertaking, will be the readiness with which, at your command, I set about it.

§. 14. The excellence of the English Constitution, though not sufficiently admired or understood by the generality of those who live under it, has been the subject of much applause to many foreign writers of the greatest eminence: some of them have commended it in a minute description of its particular qualities; others, in discussing that celebrated question "about the best form of Government," have terminated the dispute, by deciding in favour of that "*mixed form*," which chiefly resembles our own.

The Constitution of this Country, in a few words, is that of a mixed limited Monarchy. The Laws by which it is governed are what every man in it consents to; the Legislature virtually residing in the King, and the whole Body of the People: as every man is a party, either in person, as the King and the Peers; or by Representation, as the Commons. The two former act by an inherent, the latter by a delegated right. The ordinary power of interpreting those Laws is distinct from the Crown and the Legislature. The executive power is solely in the crown, assisted by Council of its own choosing: and, whenever there is occasion, by the great Council of Parliament.

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The features of *Monarchy* are visible in the executive power being vested solely in the King, and in every point of his Prerogative. The *Limitation of the Monarchy* is visible in the King's governing according to settled Law, and in his being only a part of the legislative body.

Thus are we, in fact, possessed of what Heraclitus of old pictured to himself as the best idea of Government, *the art of governing All by All*. And considering Government as a kind of political Architecture, if a Constitution like our own resembles a Pyramid, because that, of all figures, is the firmest, from the breadth of its base, and its being terminated in a point; as Government cannot have a wider foundation to rest on than universal consent, or a narrower point than the executive authority of a single Person; we may reasonably hope, while it stands on its base, that this Pyramid may vie in firmness and stability with those famous monuments of Egypt.

§. 15. If I was expected to expatiate on the essential parts of the Constitution thus described, I must repeat and explain, in less general terms, what are the rights of the king and the people.

The first are well enough comprehended under the single word "Prerogative." By Prerogative I mean the antient constitutional Rights and Power vested solely in the Crown. This is a copious subject, when it comes to be detailed into the several Branches of Administration, Revenue, Suits, and the like. The great writers upon it, Lord Bacon and Sir Matthew Hale, though they have said much, have left more unsaid. But the Power of the Crown in the executive part of Government, whereby the King acts for the Public, is what we are most concerned with at present, as pervading the whole, and active in every part of the kingdom,

dom, and at all times. And so absolute is this Prerogative of the King, confined by the Constitution to the Execution of Laws, not extending to the making of them, and exercised in the practical part of Government; so absolute, I say, is it, that neither House of Parliament regularly takes cognizance of any thing that is past, without an authentic information of particulars from the Crown itself, either in debates on the speech delivered from the throne, or on papers laid before either house by a message from the King, or in consequence of an address to him for that purpose.

To shew *Prerogative*, thus defined, is not an enemy to *Liberty*, to which some have ever affected to oppose it, I would reason thus: that the only idea of Liberty in society is the power of acting as we please, in all cases not forbid by known Law; that the just Prerogative is part of the common Law, and must be evidenced in every instance as common Law itself is, that is, by immemorial usage, uncontradicted by Act of Parliament; and therefore that the Power of the Crown so evidenced, can no more be repugnant to true legal Liberty, than a particular Law is. No new Prerogative can start up at this day, any more than new common Law; and any pretence to either, that is contradicted by antient usage, and not supported by act of Parliament, can have no binding power, or produce any legal restraint on natural Liberty.

The chief power then of executing national councils, does, by the constitution, reside in the Court: but the King, as a part of the Legislative body, in regard to Laws, does nothing in the first instance; he can at any time reject, but can never propose. His Power in that particular is only in
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the last resort; like that of a court of justice, that has final jurisdiction on appeal, but can not interpose in the first instance. In both cases, the excellence of the Constitution is seen, as both are by these means subject to the greatest exercise of the wisdom and justice of the nation.

The two Houses of Parliament are in all legislative Steps mutual checks on each other; each an active part of the Legislature; each possessed of valuable privileges and peculiarities. The House of Lords is the highest Court of Justice; the House of Commons the highest Inquest of the kingdom. The Judges, are assistants to the House of Lords in their judicial capacity, but are members of the Body of the Commons, as they emphatically stiled themselves on a former occasion.

§. 16. The Constitution thus defined as to its essential parts, has been grossly misrepresented in many very important points; which if I do not clear to your satisfaction at present, I shall so far obtain my end as to awaken your attention to them hereafter.

The records of English antiquity, few of which remain, and those few not fairly examined, have occasioned some doubt about the antiquity of the Constitution. As if in the more antient parts of its History, the traces of absolute Monarchy were discernible: as if, even in times succeeding the Conquest, the Liberty the people were in fact possessed of, was rather an Act of Grace in the Crown, than a matter of right in themselves.

That the actual exercise of Government has often in reality deviated from that Constitution now described and at this day enjoyed, is too plain to deny: and in what manner it has done so, I shall attempt to reflect on in the following observations. But the remarks Philander has already made

made will bear me out in saying, there is a great difference in the out-set between considering these successive variations as so many new attempts to settle a Constitution, or as endeavours to bring it back to the old one already settled.

History indeed carries us back as far as times preceding the birth of a single Government in this island. Cæsar found the Britons divided into several little States; and the Saxon Heptarchy broke that assemblage, which the Roman Government in a great measure had formed. But from the first dawn of Monarchy (if even these little States were not each a kind of limited Monarchy themselves) Laws are to be found coeval with it. From the Conquest, I suppose, this does not admit of a dispute; though I am aware even at this period, the Laws which I urge as a proof of the Limitation of the Monarchy, are turned against us. The objection on a larger bottom is, that the Laws, for a long time after the Conquest, carry the air of a Royal Grant on the face of them; rather than that of a Parliamentary Sanction. This objection might be answered from the style of the Laws themselves; and in that view, the strongest exceptions that could be taken would vanish as soon as mentioned: but that subject may meet us again hereafter, and would be too great a digression in this part of our enquiry.

Others have argued from the want of Returns to Parliament being found, to the want of Being of a Parliament itself: which supposition, besides being refuted by fact in this instance, may be extended to shake the credit of half the English history.

Again, the formation of two distinct assemblies of the Lords and Commons, some have as wisely made the Æra of Representation of the People;

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though there are arguments enough to prove, that the two Houses were as distinct in their legislative capacity when they met together, as they were when they separated, and formed two Houses, as we now understand the phrase. It would otherwise have been unnecessary to have reckoned them as component parts of a Parliament in the antient Acts, as was usually done long before any traces of distinct parliamentary assemblies.

The true antiquity of the Representation of the Commons is a point, as I take it, entirely unfathomable. There is very little evidence at all about the matter, that goes very far back; and most of that is so ambiguous, as to furnish no clear decisive conclusion. But whatever the mode of this representation originally was, or though it might long continue to be different from what it has since been, it is very difficult to dispute its existence: because it corresponds with the abstract reason of things in the idea of a free Government; it results from the origin of Government as founded on consent, and that of our own in particular, not an absolute but a limited Monarchy. The Body of the People must, therefore, always have had some right to share the legislative power; it cannot be supposed this right could ever be entirely given up, but only delegated to others, entrusted to act for them.

The latest writers upon the subject, who have ransacked the voluminous controversy kept up by Dr. Brady, Petit, and others of the last century, and who may be supposed to have picked out from all of them what they apprehended the strongest part of the argument, have left it just where it was. And as it is easy to see that in discussing this question much must be supposed, as well as argued; it may be as well for the future, at least for us at
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the present, to suppose at once, without the parade and futility of argument, a thing in itself highly agreeable to reason, rather than again to attempt to prove it, much more than to attempt to disprove it, by a crowd of authorities, most of which are dark, equivocal, or inapplicable.

The Separation of the Houses is commonly referred by historians to the time of Edward the Third; though I have never been able to find on what argument the supposition was built, except that of seeing no traces of separation before that time. The precise year of the separation no body has ever pretended to fix; but the supposition of the separation commencing in the reign of Edward III, is very probable, as will appear from considering a very particular circumstance; which I apprehend will support the notion rather by a positive fact, than leave it to be barely concluded (as it has hitherto been) from want of evidence to the contrary.

Lord Hale, from a very careful inspection of the old Parliament Rolls, has observed, that from the time of Edward I. Acts of Parliament were drawn into the form of a Law in the first instance;—but he adds, “that from near the beginning of the reign of Edward III. ’till very near the end of Henry VI. they were not in the first instance drawn up into the form of Acts of Parliament, but the petition and answer were entered in the Parliament Rolls, and out of both, by the advice of the Judges and others of the King’s Council, the act was drawn up conformable to the Petition and answer.”—The observations arising from this remark of Lord Hale’s, I think, are fairly these; that on the one hand, the separation of the Houses, supposing it happened in his reign, accounts for this alteration with respect to the introduction of the

petition and answer : on the other hand, that this alteration in the manner of passing Laws, was an immediate and necessary consequence of their separation, and therefore in some degree a proof that they separated at this time, and not before. For, 1. the time itself corresponds in both cases. 2. Their connection seems evident by considering that more form must necessarily be required in obtaining the Royal Assent, and the consent of the Lords, when neither the King nor the Lords met together with the Commons, than what was required when they did meet together. This conjecture, however, on a nice point of antiquity, you will, I am convinced, receive with candour, as I promise, on my part, it will not be defended with obstinacy against reasonable conviction.

§. 17. One would think the objects of Representation should be less liable to difficulty than either its antiquity or origin. Every body might know what a Parliament is, and that it consists of the "*three Estates of the Realm*:" yet even here writers of great character have introduced a difficulty, though sometimes perhaps rather to manage a present controversy, than grounded on any real doubt of their own. Some, by the "*three Estates of the Realm*," understand the Nobility, Commons, and Clergy ; and hold a Parliament consists of the King and the three Estates, of the Realm. On the other hand, the better part (as I conceive) include the King as one of those Estates : and in their notion, the King, Lords, and Commons, are the three Estates of the Realm : these, it is plain, do not in this respect distinguish the Bishops from the other Lords, nor the Clergy from the Commons.

Now if this controversy is not merely verbal, as I suspect it is, it is capable of being brought to a short

short issue. It may be allowed, I think, that an Estate of the Realm, considered as a component or integral part of the Parliament, if it means any thing, must mean one of the essential parts of the Legislature: without the consent of which, or of the majority of the individuals that compose it, no Law can pass. Thus it is well known if a Bill does not gain the consent of the Lords and of the Commons, as well as the Royal Assent, it never becomes a Law. Those who maintain the Clergy, as distinguished from the Laity, are a distinct State of the Realm, must, in defence of one hypothesis, be obliged to maintain another more difficult to support than that for which it is intended to be a foundation. They must suppose, as indeed they seem to have done, that the Clergy in Parliament must be represented by the Bishops: from which notion these consequences follow; 1. First then the Clergy, who are, except the Bishops, all of them strictly Commoners, are represented by Lords; a mode of representation not analogous to that of the Commons among the Laity. 2. If the Bishops are the Representatives of the Clergy, and in that case a separate State of the Realm, their concurrence must be an essential requisite to an Act of Legislation: no Law can pass without their consent. This, as I have already said, must be the idea of an Estate of the Realm. Perhaps they will abide by this latter consequence, and in proof of their notion, refer us to the legislative declaration in every Act of Parliament, which runs, "It is enacted by the King, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled." This distinct enumeration, they may urge, shews the Spiritual Lords are a distinct State of the Realm. In my turn I must ask, 1. Whether the Spiritual Lords would not be included

included if not expressed; if the clause had run by the King, Lords and Commons? If I mistake not, this form has been used. 2. But though expressed, does it mean any thing more than a bare division? Would not the third Estate, the Commons, if characterised by the various objects of Representation, be the same in effect as it is now, if it was to run (instead of Commons) Knights, Citizens, and Burgesses in Parliament assembled? This form I know has been used, and the effect has been the same: and if any argument is to be drawn from the similarity of the cases, the express mention or omission in the first case would have no more weight than it has in the other. And yet though the express mention of the spiritual Lords does not make them a distinct branch of the Legislature, there seem to be many good reasons for this form. This insertion serves as a constant recognition of their Legislative capacity, either 1. to prevent people in all ages arguing against their legislative right, from some peculiar circumstances attending them; as their not being tried by Parliament as temporal Lords, in the forms of proceeding at Common Law; or their not giving their votes on the Trial of a Peer, though, it is well known, they attend during the evidence, decline voting in capital cases from principles of the Canon Law, but when they retire, always protest their right of voting. 2. More particularly in these later times, to express a just abhorrence of the former age, when their rights were so wickedly attacked, and their removal from the House of Lords was the first step to the dissolution of the Government. This sacred order, a very early establishment of Christianity, I consider as one of the guardians of the English Church in the most eminent manner: and in that capacity, I hope, they will continue to sit in that House to the end

end of time. For the antient Ecclesiastical and Civil Establishments are so interwoven in our Constitution, and formed for each other, that any one who is not indifferent to the latter, can not but wish perpetuity to the former!

But the question now before you is, whether the Spiritual Lords are a *distinct State* of the Realm? It seems to be clear in the material sense as a distinct Branch of the Legislature they are not. For suppose a Bill brought into the Upper House which the Bishops were unanimous against, and that the Temporal Lords, or at least a majority of them, was as strong for it; I apprehend the Bill must pass, notwithstanding the dissent of the Spiritual Lords. If so, they can be no separate State of the Realm. Whether the insertion of the consent of the Spiritual Lords should be continued in the Bill in such case, being an averment against fact; or whether that insertion is rather matter of form (for, though antient, it has not been regular nor uniform) might be matter of question? But suppose a stronger and a more probable case, that the majority of Bishops were against a Bill, and the rest of the Bench concur with the majority of the temporal Lords in passing it; the expression in the Act would in that case be realized, and I make no doubt the Bill would pass: or else it must be allowed, the majority of the Bishops might at any time controul the majority of the House. But if the Bishops are really a distinct State of the Realm, the majority of their order is as necessary to every legislative act, as the consent of the majority of the Commons is to pass a Bill through their House. So that, in whatever light the case is considered, it appears the Bishops do not sit in Parliament as Representatives of the Clergy; nor can be considered as a distinct State of the Realm. I know the argument

ment of a considerable writer on this subject, chiefly turns on the admission of his antagonist, that the Clergy are one of the three Estates of the Kingdom, and he infers from thence (justly as it seems) that they must therefore be one of the three Estates in Parliament." But I am at a loss to guess what that writer means by three Estates of the Kingdom, unless considered merely in respect to Parliament. If the subjects of this kingdom are to be considered in general as Clergy or Lay, there would be but two Estates of the Kingdom; but if according to their Professions or Employments, there may be ten times as many.

§. 18. The Constitution has likewise had the ill fate to be censured as well as misunderstood. But because my audience are as little disposed to listen to cavils, as I am to be at the pains of refuting them, I shall not mention any trifling exceptions, but some that are of more weight and more extensive consequence. The Representation of the People, it is thought, is not only grossly unequal, but in effect perverted from the natural Interest of the Country. If I understand this last objection, it might be waved in this disquisition; because it is rather an accidental deviation in fact from the Constitution, than any fault to be imputed to its frame and essential structure: but however, it shall not altogether be passed over in silence.

The Representation then is censured as very unequally distributed. The Counties and large Cities are thought to have too few Representatives, and the infinite swarm of little insignificant Boroughs, which Bishop Burnet has somewhere called "*the rotten part of the Constitution*," are thought, and, in one light, justly thought, to have too many. Those who make this objection will extend it by enumerating consequences, to which their imagination,

nation, at least, has given an air of reality. They will tell us, that it is from hence, if from any quarter, must creep in that corruption, that may, in time, destroy the Constitution. For if any should come in by Corruption, they would maintain themselves there by it ; would sell their votes to reimburse the purchase of their seats. They will tell us, that it is bad in many other views ; that hence the monied Interest come into Parliament, in opposition to the natural Interest of the Country : and those who have not a foot of Land (say they) will care very little for the Measures that chiefly affect it. What is it to them, whether the Land is over-taxed or uncultivated, while the Traffic of Public Funds is advancing on its decay ? The surprising number of little Boroughs too (independent of the Corruption, that probably flows from hence) will be one reason, why many of their Members must be Strangers to the particular Places they represent. Not, perhaps, Strangers to the Constitution, as in the former case ; but such Boroughs must be represented by those, who, if equal to the trust, yet living at a great distance, can never protect, or be acquainted with the Interest of their respective Boroughs, so much as others of equal abilities must be, if chosen from their own neighbourhood or Country. This was the wisdom of the Constitution (it may be said) in the return of Juries ; can we imagine it to have been less intended as to Members ? Was every Case of Private Justice to be decided by those, who from their vicinity to the place where the Question arose, might best understand the nature of the Case and the Evidence before them ; and yet are questions of importance to the Community, more particularly to some parts of it, fit to be discussed by those who are acquainted with no one part of it
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more than another? The term *Election*, they will add, must become merely nominal; or else who can suppose it natural to *elect Strangers* to represent them? the Congé de Elire for a Bishop, is not in course of time become more fabulous than such an Election of a Member. The Writs of Election themselves, speak as strong in this case as the other do in case of Juries. Particular places themselves too, it may be thought, suffer in other respects on this account, besides having nobody to protect their Interest in Parliament. A decay of hospitality, the good genius, as it were, of a country life; and a neglect of the friendly intercourse between Landlord and Tenant, may often be another consequence of slighting the owners of landed estates as Representatives. There is no tie to live with, or do good acts of neighbourhood to those, who, in the most important cases, will prefer a Stranger to a Neighbour. Rents can be returned at a distance; and though the Estate may suffer when deprived of the residence of its Owner; or the Profits may be sunk in passing through the Stewards hands: yet the Owner submits to this tax, to live more at his ease or fancy elsewhere.

Though these circumstances should not always take place; yet (they will add) the eye of reason, impartially surveying the plan of a well-modelled Legislative Body, will look upon a small Borough sending as many Members as one of the first trading Cities, or as a large County, in almost as ridiculous a light, as one particular instance of Representation, alluded to by Mr. Locke, than which nothing can be more confessedly absurd, “ that the
 “ bare name of a Town, of which there remain
 “ not so much as the ruins, where scarce so much
 “ housing as a sheepcote, or more inhabitants than
 “ a shepherd, are to be found, should send as many
 “ Representatives

“ Representatives to the grand Assembly of Law-makers, as a whole County, numerous in People and powerful in Riches.” All this may be said perhaps in support of the objection.

§. 19. What are we to say in answer to all this? These two things I conceive. 1. That admitting this inequality to be the grievance complained of, it can not now be redressed. 2. That it may reasonably be doubted, however, whether, every thing considered, it is in fact such a grievance or not.

If it is a grievance, it is such an one as can not be redressed. And I found this assertion on two grounds; that the very attempt to do it would totally unhinge the Constitution; and if it was once done, according to the most imagined plan of perfection, the effects of it could never be lasting.

Political Projectors will tell us perhaps, this new modelling of the Legislative Body would be only, “ *Ripigliare Il Stato,*” in the Florentine phrase; “ bringing things back to their original establishment;” an expedient approved of by all politicians. I should rather look upon the expedient, in this case, not as an attempt to resettle, but to new-found the constitution: which if it could succeed at last, must in the preparation towards it produce universal confusion; by dispossessing every part of the Kingdom of Rights they have so long been possessed of; and in their nature the most important of all others, because they are the foundation of their security and protection. To disfranchise the Boroughs themselves, answers no end; a prescriptive Right of sending Members would continue. To disannul that prescription would be little less than Suicide in a Parliament. It could never be thought of in practice but in the most troublesome tumultuous times; or at least can not fail

fail of producing them. It was not perhaps the worst project of Cromwell's time; but it was certainly a project fit for no time, but such as his, when the constitution was already overturned; and it was only left to consider how they could build a new one on the ruins of the old.

But supposing this Reformation once made, could it be lasting? Would not this inequality in the Representation imperceptibly recommence almost as soon as reformed? Much of it is owing to the surprising alteration that time and accidental causes have produced in the commerce, wealth, and importance of places themselves. Some, for instance, were once Episcopal Sees, and Places of great opulence: though now within the reach of the objection, almost as much as any Borough whatever. Another cause of the inequality complained of, arises out of this already assigned. Many Boroughs have been so sensible of their decline, and their comparative unimportance to the Community, that they have themselves petitioned against, and abolished their own right of Representation. For a Member's wages, it must be owned, was, heretofore, no inconsiderable Tax on a small Borough. And may not these or other unforeseen causes, at the distance of a century or two, operate as strongly after a Representation was new modelled, as they did before, when they gave rise to it?

If then this inequality of Representation can not be altered without the utmost hazard, and when altered, can not be secured from returning: what reasons can there be for making the alteration? Much less, sure, is to be said for the alteration, if the thing itself is such a grievance, as is neither publicly seen nor felt.

In fact, the grievance from this quarter is chiefly speculative: the objections I have stated on this head,

head, do not flow altogether from this source: they have other causes capable of producing them as well as this. And the objections are so far from actually existing at the same time, (as they are stated) that one may serve to take off the force and pressure of the other.

In the first place, I am not satisfied that small Boroughs are the only spot where Corruption thrives: it is a weed that naturally thrives best in a rich soil; it grows up with Liberty. It can not be perfectly rooted out, without injuring the better product of the Soil itself; but there are ways of keeping it under.

But small Boroughs, it is said, are more liable to Corruption, because more likely to be represented by Strangers; and this goes upon a supposition of that kind which the Logicians call a *petitio principii*, that the Election of a Stranger is, in effect, rather a purchase than a choice. That many of the Representatives of small Boroughs must be Strangers to the Places they represent, I admit: those who are qualified, merely in respect of neighbourhood, may be disqualified for the trust in other respects; neither their fortune, capacity, nor inclination, may sufficiently concur for this purpose.

That small Boroughs must exist as well as large Boroughs and Cities, has been already clearly shewed; and that Time and Chance will be an overmatch for any Reformation of this kind.

But from the necessary existence of small Boroughs, I am enabled to answer the objection that was made to them, merely from their being represented by Strangers. 1. It is not only necessary they should be so represented, where there is *no one qualified* who is an Inhabitant or Neighbour: 2. But even on many accounts, though there is,
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And this latter, for the Interest of the Borough itself, and of the whole Community at large.

1. For the Borough itself. For by these means, the Choice may as well be supposed, on an equal chance, to be improved in some instances, as perverted by Corruption in others. Should it be insinuated that a stranger is not able to promote the particular Interests of any Borough so well as one that has a natural Interest; it may well be doubted. In the first place, when a Member is once elected, there is a total delegation of the political Power of the Constituents to the person elected as their Representative; without their being able to enforce their instructions to their Representative; or his being accountable to his Constituents for his conduct. And however dissatisfied they may be with his Conduct, in respect to public Measures, or the Interest of the Borough in particular, I know not how they can redress it otherwise, than by being more cautious in the disposal of the Trust for the future, when the term of the Trust expires. And this circumstance, among others, may serve to prove the utility of frequent Parliaments for the particular interest of the Constituent. But supposing a Member (as we may in general suppose him from motives of Gratitude as well as Interest) inclined to listen to the Instructions of his Borough; a Corporation may inform a Stranger, as well as they could one of their own Town: and he can present their Petition to the House as well as any one else. But what, in the mean time, is this *Natural Interest* that is so much talked of; that gives one man, who lives within a mile of a Corporation, so just a preference to one who does not live within a hundred? It is not in point of abilities of the Candidate; because abilities are not local. It is not in point of income, for the same reason.

reason. The objection, perhaps, supposes, that the income of a Stranger is too apt to bear down every thing else; to lay abilities entirely out of the case; and to make its way merely by its weight. Are then, on the contrary, the abilities and character of a Neighbour always the ground of such an Election? Or is there no violence done to the Freedom of Election, from this quarter? Such an Election may often be the effect of an undue influence, though not of Corruption; Corruption, I mean, in the confined sense, in which it is commonly used to denote pecuniary influence alone. And in arguing this question, you will excuse me if I desire another Term may be settled as well as that just explained. If Natural Interest means only a large Estate in the Neighbourhood of a Borough-Town; the argument in favour of its Proprietor is by no means conclusive. If the idea of a large Estate was naturally united with an idea of actual Benevolence, as extensive as the opportunity of doing good: when it is so united, how is it possible an Election should not be decided in favour of such a Candidate? At least, who, that was not lost to all sense of Merit, and of his Country's Interest, can wish it otherwise? But if the owner of such an Estate should either be not known to his Neighbours, or known greatly to his prejudice: if he was to bribe or to threaten his own Tenants to compel their assent to his Nomination; though he owned half the Borough-Town, I should always think, any one in the World (that the Law would allow to be a Member) would be a more eligible person, than such a Candidate. It might then happen to be the Interest of the Borough itself to chuse a Stranger.

2. That it is for the advantage of the Community at large, that many Boroughs should be represented by Strangers, is a concession we have a right

right to expect from those who censure the general inequality of Representation in this Country. I will explain myself by particulars. The County of Middlesex, for instance, where the greatest part of the business of the Kingdom is transacted, where every person of figure almost in the Kingdom resides, either constantly, or for a great part of the year, contains but one City, and not a single Borough: some remote Counties have at least a dozen. Is it not for the Interest of the Public, that many of those who live in this County, should consult on National affairs? Many of them have no Natural Interest out of this County; and, therefore, unless they offer themselves to Boroughs in another County where they are strangers, they can have no share in Public Councils. This, in effect, brings the Representation nearer to an equality: by these means Middlesex or London, though each has but one place of Representation, will have, in effect, ten or twenty, as its principal Inhabitants may be elected to serve for so many Boroughs elsewhere.

There is another and no very inconsiderable advantage accruing to the Community, from the admission of Foreigners (if I may call them so, in opposition to Residents) to represent Boroughs, where they have no particular Interest: that by these means Irish Peers, Scotch Commoners, and the Eldest Sons of English Peers, are more easily enabled to have a share in concerting public Measures. From the first circumstance, more harmony respectively between the different Nations, is likely to be the consequence of the same Person being capable of consulting the Interest of each. And as to the case of Peers Sons, particularly the Eldest, sitting in the House of Commons, I do not so much rely on the advantage of two in the same Family.
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having a Seat in both Houses, because it is but an accidental advantage, and may change its complexion according to the State of Parties; but I must urge it as an excellent Constitutional Education against they become Peers themselves. They by these means become early acquainted with business; and will scarcely forget ever afterwards, in the Upper House, the Liberty and Privileges of the Lower, which they formerly insisted on as Members.

I hope after this tedious examination of a censure too hastily passed on the Constitution, I may conclude, that the inequality of Representation is not in reality the dreadful grievance complained of.

§. 20. The other censure that was passed on the Constitution, from an improper as well as unequal Representation, I said might be waved, because it is not general; and not so much to be imputed to the Frame of the Constitution, as to an accidental disregard of it. I did, however, state that objection, and have in part answered it, as it blended itself with the other: and I will now shortly consider it by itself.

The *Monied Interest*, in opposition to the *Landed Interest*, considering them as absolutely distinct in the Proprietors, ought never to be preferred to the Landed Interest in the choice of Representatives. The reasons urged in the objection seem unanswerable. But where one kind of Property is tempered with the other; the reasons, on which the objection turns, seem to fail. And it is sufficient to say, the Laws of this Country, as well as those of all well-policed States, have secured a Landed Qualification as a necessary Requisite for the admission into National Councils.

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I shall only add, in a general view of the Constitution, it would be very unseasonable to examine the propriety of every particular Measure, which the Law has prescribed; where the Constitution has necessarily entrusted the Law with the power of making such provisions as the occasion requires. I only wish I have not been too particular already.

I flatter myself I have already traced the great outlines of the Constitution; if these are correctly drawn, it will be easy to fill them up at any time. It was admitted at the outset, that the administration had sometimes differed from the Constitution described; I will not scruple to say, in some instances, it has varied so much as nearly to destroy it.

§. 21. When I go on to explain this, it would very ill become me to reflect upon any little miscarriage in the event, or misconduct in the Councils of this or that particular year. The present subject is too great for such a minute attention to particulars: my own abilities as well as inclination are too small to set about it. Fundamental Errors are important and standing lessons. The Reflections that arise from facts of a general nature, where they do reach particular men, are supported by History, which is the voice of Truth; and borrow no Complexion from a spirit of Party or Detraction.

From the Plan given of the Constitution, you must collect that its Preservation depends on the free action of its several parts: it is this alone preserves the Balance. The executive Power, by the Constitution, is vested in the King alone; if, therefore, either, or both Houses of Parliament, were to take the Administration of Government into their own hands, there would be an end of
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the King's Prerogative for the time, and in that of the Constitution. The Constitution would be equally overturned, if the King was to assume the sole Power of making or dispensing with Laws; because in either case the Parliament would be but a shadow. To bring back the constitution, if at any time it should be thus infringed, to its true principles, without changing it; to give the only effectual application in this Country to the "Florentine maxim," without the confusion of which it will in most cases be the Parent, must, from what we have seen, except in very extraordinary conjectures, be the work of time alone; to operate in the one case, above put, by a change of the administration, in the other by a new choice of Representatives.

I have already disclaimed shewing in particular instances, how this Balance has been affected: let us just view it in the general course of History; more especially from that period, where the Civil Constitution becomes more easy to be traced, and more necessary to be known; I mean from the time of the Seventh Henry.

§. 22. The Government, in the actual exercise of it, in the early times succeeding the Conquest, inclined more than it ought, sometimes to the absolute, sometimes to the mere Aristocratical Form. The Political maxim is, in general, very just, that says, "Power follows Property." And in the times, when the Feudal Tenures prevailed in their greatest purity, the power of the great Barons, had it been regularly exerted, might have made the Government Aristocratical. But their occasional adulation, or unequal opposition to the Crown, often brought it nearer to an absolute Monarchy.

Henry the Seventh depressed the antient Nobility as much as he could. He governed principally by an Ecclesiastical Ministry, whom he and their own abilities had altogether raised; he attainted the Yorkists, of whom the Nobility chiefly consisted; he consented to some Laws, made to promote the freer disposal of Estates Tails: and these circumstances co-operated with an increased Luxury, that was the offspring of an increased Commerce.

The depression of the Nobility, by taking some weight out of one Scale, brought the Popular Scale nearer to a Balance with the Nobles. And the weight, added to the Popular Scale, by their own Trade and increase of Riches, from the discovery of the new world, brought them still nearer to a Balance.

But the Political consequence of the People, though greater with respect to the Nobility than they had ever known, was but little, as yet, with respect to the Crown. From King Henry the Seventh to King James the First, including both their Reigns, the Crown, excepting some short intervals, exercised more than its share of the Legislature: and the People had less of Liberty than the Constitution designed them.

A too sudden and impious check of the Power of the Crown, at the close of the next Reign, produced a sudden Democracy. And, indeed, it is scarce to be wondered at, that a People who had so execrably vacated the Throne, should abolish a House of Lords. A just repentance of this Usurpation guided by the hand of Providence, shewed itself in the *Restoration*. But from that time to the *Revolution*, though each part of the Constitution was nearer its proper poize; it rather gave way to a stretch of Prerogative, and a thirst of absolute Power.

Power. In the first Reign, from an occasional mixture of indolence and dissipation in the Prince, the artful gaining of some leading men on his side, and the undue exertion by the Commons of the Power they were then possessed of; and which, from being over-great in the foregoing Reign, sunk below its proper level in this. In the Reign of King James the Second, Papal Bigotry co-operating with the same spirit of Prerogative, had a stronger tendency to absolute Monarchy; but moving more violently, was more suddenly and fatally checked. From the *Revolution*, I believe we are all agreed this Balance of the Constitution has been, upon the whole, excellently preserved: and whatever little storms or heats of Faction have arisen, (as no length of time, I am persuaded from a review of our History, will be free from them) they have rather served to explain and settle some important Points, than in any formidable degree to violate the Constitution.

§. 23. The Balance then of this Constitution, you see, has sometimes been lost; though, by the hands of Providence, it has, in time, been again restored. And if we were to glance back, ever so slightly, on History, we shall find the only methods that have or can be employed, to destroy this Balance, were by overstraining the respective parts of the Constitution.

It was Lord Burleigh's maxim, "that England
"could never be ruined but by a Parliament." It may, however, be greatly hurt, if not ruined, without one. If the Crown, was either, of course, to dissolve a Parliament that opposed its Measures; or made a point of securing a Majority to carry them, either by an excessive number of Place-men in the Lower House, or an occasional increase of Peers in the Upper; this would make large strides
towards

towards the application of Lord Burleigh's maxim. But we have seen from History, the Crown may be more prejudicial without a Parliament than it can with it; by an improper or ill-designed exercise of Prerogative. A Parliament that is fitting, that has been chosen freely and acts without corruption, has various ways of obstructing the progress of such mischief: by refusing supplies; by remonstrances to the Crown; by impeaching a corrupt Ministry. And in this last particular, the Constitution has gained much security by the concession the Crown made in the Act 13th King William III. in giving up the power of pardoning in cases of an Impeachment by Parliament: for otherwise it is evident the most corrupt Minister, under a public prosecution, after the most glaring proof of his iniquity, could easily have defeated all, as it were by pardoning himself. But no extensive schemes can be pursued without money, the great external principle of motion in a State, for want of which, however well fitted for sailing the vessel may be in itself, it will be becalmed, and must wait for a wind! The effective power of the Crown will therefore necessarily be connected with the Parliament: and, therefore, unless a King is inclined to reign without a Parliament, and support bad Schemes, either by Exactions at home, or Loans from abroad, by oppressing his people or incumbering his revenue, (all of which have been practised in distant reigns) the execution of his Schemes must be enforced by a Parliament; and England, if it is ruined, must in such cases be ruined by a Parliament. That period, I hope, will never exist; judging, at least, from the Constitution grown up to its present maturity, and the essential parts of it at this day excellently well preserved, I flatter myself, that period will scarce arrive,

arrive, till universal Barbarism once more darkens this Western Hemisphere; and Political Liberty, with Science its constant Companion, is exiled to some distant part of the Globe.

POLICRITES.

§. 24. I find you are winding up your subject, and by the tone of your voice, will soon drop into a conclusion. But, entertained as I have been, I have all along been disappointed, in having no sketch of our Legal Polity; which surely, in a Constitution governed by Law, as you set out with observing, is a subject of great importance; and which you can not have the excuse for declining, that Philander made with great propriety in his part of the conversation. Though I suspect your good breeding, rather than your memory, is to be blamed for this omission. You seem industriously to have avoided that topic, perhaps looking on it as a mere drug to one who is of the Profession, or rather out of compliment to Philander, who is not.

EUNOMUS.

I can not but say, that each motive had some weight in occasioning my silence on that head.

PHILANDER.

I do not see why they should: I can answer for my own curiosity to be informed upon that subject, and I am sure you can do it in a manner that shall not be prejudiced by my want of experience. Policrites has already begged it: I concur with him; but must desire you would address yourself
to

to me altogether, as if Policrites was out of the room; otherwise, your meaning may be so involved in the mist of technical Language, that it will too often escape me, and I might as well be out of the room myself.

E U N O M U S.

I believe Policrites will join with me in thinking your restriction very reasonable; and I will endeavour to conform to it, as well as satisfy your request.

§. 24. To give you a tolerable general idea of our Laws, which is all that can be done in this conversation, instead of puzzling you with the scholastic divisions, which many of our writers have fallen into in considering its constituent parts, I will reduce them under those two comprehensive Heads, to which, not only Fortescue and Lord Hale have referred the Laws of England; but all Laws in the world may well enough be classed under, and have been so by antient Writers; I mean *written* and *unwritten*: and these, in our own Constitution, are the *Common Law* and *Statute Law*. When I have explained the characteristic marks of each, you will well enough understand one restriction that must be added to this general division; though if I was to begin with it, it would confound ideas rather than clear them.

By *Common Law*, we mean those general Customs that bind the whole Realm, by an immemorial usage. The time of Memory (as it is called) or the particular æra, that distinguishes the nature of these Laws, is the first year of King Richard the First. Every thing that was matter of general obligation before that time, with all its consequences, is said to be by Common Law; every new obligation

obligation induced since that time, must be by some Act of Parliament, the very Letter of which Law is now remaining. What I have further to say of the Common Law, shall be only by way of Comment on this definition.

And from hence you will observe that, though indeed the Common Law, in general, is *Lex non scripta*, yet some part of it may be preserved in writing without derogating from the just idea of it. A Custom surely is not altered by writing it. Every thing that does bind the Subject, and is not in Writing, must be in force as Common Law: but Common Law itself may be preserved in Writing, provided its usage is immemorial, or the date of that Writing corresponds with the other part of the definition, by being antecedent to the period abovementioned, "as the time of Memory." Any matter of Common Law obligation then, it is evident, may have some evidence preserved, though the very text of the Law is not: in Acts of Parliament, the words of the Law are at the first instance put into Writing; that Writing is published, and continues to this day in its original Form.

§. 26. The general matter of Common Law, comprehends the course of Descents (even of the Crown itself, when the line is once fixed by Parliament) several Rules of Property; the Prerogative in its utmost extent; the Jurisdiction of Courts; the Practice of those Courts; the Forms of many Oaths; the Rules of expounding Acts of Parliament; various particular Customs; and the general Nature and Punishment of many Crimes; with regard to which *Christianity*, as well as the *Law of Nature*, have ever been considered as part of the Common Law; and flagrant and public violations of either, are under the Censure of that great Court that has been, not improperly, styled the *Custos Morum* of the Kingdom.

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There is a very great connection between Common and Statute Law, though they stand sometimes in opposition to each other. The former is never to be forgotten in considering the latter, though the latter should, in its very terms, be designed to repeal the former. In considering an Act of Parliament, we must often take up the subject matter as it stood at Common Law; but must always borrow rules of construction from thence. I should be premature at present, if I was to insist longer on this point.

§. 27. I said Common Law was what bound the whole Realm, and called it *general Custom*; I added, that it included *various particular Customs*; where these latter prevail, they will interfere and controul a contrary general Custom; they are both Common Law; but the latter more nearly resemble what the Roman Law would call *Privileges* or particular Laws.

And in this place, I may observe, there are many other particular Laws which bind some persons in consequence of some particular relations they stand in; and are not to be considered as general Laws of the Realm, binding on all the Kingdom. They are much the same in this respect, as private Acts of Parliament: in which the Subject and Parties are confined. The particular Laws I mean, are as well the local Customs mentioned, Corporation By-Laws, and College Statutes. In most of these cases, a kind of *smaller Societies* exists in the great one: these Societies, like all others, are founded in compact, (as Philander has justly observed) and the Members of them, who derive benefits from the connection, must submit to the obligations that it imposes. The Members of these Societies continue in all respects, (except for the particular purpose of their Institution) in subordination

nation to the Society at large, and are bound by the general Laws of the Realm: the only difference between them and other Subjects is, that the Members of these inferior Communities are bound by some Laws which others are not; because they receive advantages exclusive of others. And it is on this ground only, that *Foreigners*, as they are called, that is, those not incorporated, are ever subject to By-laws of a Corporation: because in the instances in which they are bound, a clear benefit arises, and is, in its nature, implied from the transaction; as in the payment of a Port-Duty. It is on the same extensive ground, that Foreigners, in a large and proper sense, are bound, during their Residence, by the Laws of this Country, though they did not consent to the making of them, because their consent is implied in their residence; and as they have the advantage of the Law in Protection, they must repay it by Obedience.

The particular Customs I mentioned, are innumerable; some of them whimsical and unaccountable. Those of the greatest extent are, Gavelkind and Borough-English, as to the descent of Lands; the Customs of London and other Corporations; the various modes and services of Tenure: but Custom has the largest and an almost universal dominion, as to Copyholds and Tythes.

The Common Law admits these special Customs as part of itself, but is cautious in the proof of them, and all built upon them; because it loves "one common Rule." It is for this reason in ancient Corporations, By-laws must pursue their Custom; in new Corporations, where there can be no Custom, they must be reasonable, and for the benefit of the Corporation.

It is for this reason too, that where a Custom is set up in discharge or variation of Ecclesiastical Dues,

Dues, the Common Law takes the trial of the Custom to itself.

These Customs, however, though now at variance from the general Law of the Land, were, in former times, in many instances in conformity with it. They are now part of the Common Law; they were then, I may say, the general Common Law itself. Thus the equality of Gavelkind distribution, is much nearer the dictates of Nature, than the present mode of Descent, and till the Conquest was the only one: thus the customary power of devising Lands was no other than what the Common Law allowed to every body; though intercepted for a long period, and revived at last by the Stat. of Henry VIII. Both these modes of acquiring real Property, were checked by the genius of the Norman Policy; though the latter only, by favour of Law, has recovered its ancient course.

The Common Law that I have been speaking of is sometimes opposed to the Civil Law; sometimes to Equity; sometimes to Statute Law: in all three senses, it is to be understood, at present, to represent its most diffusive and general Nature.

§. 28. The Time or the Origin of this Denomination, are not easily discernible. Whether it first was set up in contradistinction to particular Customs, which, however, are included in it; or to other Foreign Laws, either of the Church or the Empire, in part admitted here; or to the union of those Provincial Laws, that obtained during the Heptarchy, is not very material: the term itself is well understood to mean, in part, "the common Rule of Justice in this Kingdom." The same great Rule is meant by other descriptions in old Laws; for the *Lex Angliæ*, and *Lex Terræ* of Magna Charta, and the Statute of Merton, are

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no other than the Common Law. Lord Hale has observed, other modern Nations have distinguished their municipal Justice by this name: we may go further by observing, the Poets speak “ of the Common Law of Greece” itself.

The Origin of the Principles of the Common Law, is much more obscure than that of its Etymology. That which, at present, characterises its true genius, must be its apology in this respect; “ it is, in the highest sense, beyond time of Memory:” and the single instance that *Cæsar* mentions of the punishment of one species of Petit Treason, and which still remains, is sufficient to shew the great Antiquity of the Common Law. And it is very probable, there are many parts of it now remaining, which prevailed at that time.

POLICRITES.

Almost certain, I think; if *Cæsar* may be an Authority. He has given us the very outlines of “ Excommunication,” to enforce an Ecclesiastical Jurisdiction: and another point of Civil Government, very antient and fundamental, the “ duty of private Persons to apprehend Criminals against the State, and carry them before a Magistrate.” I consider *Cæsar* as our first Reporter; you have applied what he had said of Gaul, as if said of Britain: in this you are justified by the event, and by his declaration, “ that Gaul copied its discipline from Britain.” I have done it with that Liberty; and happy I am that this candour of an enemy has set us out in such colours. I only hope his account overcame Tully’s prejudices; we, in our turn, have as much reason to suppose, Britain had Laws of its own, when four hundred years before

before Tully wrote, Rome was obliged to send to Athens for its Laws.

E U N O M U S.

You carry your System very far back indeed : not to overthrow it, before it is compleated, I will go on quietly with my Subject. As I must occasionally touch once more on the Common Law, I will leave it at present, and will only say, whoever would be well acquainted with it, must listen to its great expositors, Lord Coke and Lord Hale ; particularly the History of it by the latter, worthy of the abilities of that great and excellent man.

§. 29. The other principal head of our Municipal Law, is the body of *Statutes* or *Acts of Parliament*. This is a very copious subject, though little touched on by any of our writers : I shall endeavour to confine my Plan, being afraid of saying too much, rather than too little.

I was much pleased, Philander, when you was explaining the origin of Society, as founded on Compact ; and considering Laws, passed by consent, as so many renewals of the original Compact ; to think, that instead of a dry acquiescence in the justness of your observation, I should be able to applaud it more effectually, by shewing, that, in reality, as well as in appearance, this *mutual consent* was never so striking as in the English Constitution.

In proof of this assertion, I need only appeal to our manner of passing Laws, and the declaration in every Law that is passed of the authority from whence it is derived. For who is there, that does but open an Act of Parliament, and understands, from the first page, that every thing contained in it, is “ enacted by the King, by and with the ad-

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“ vice and consent of the Lords Spiritual and Temporal, and Commons,” but looks on this declaration, as a constant recognition of that consent, which is the parent of all good Laws, and just obligation to obey them? Let us too, in further proof of this assertion, recollect, that whenever either of these parties is wanting, there can be no Law; and, therefore, no obligation of equal force and extent with that of Law.

§. 30. From this concurrence of the three States of the Realm it is, that an Act of Parliament is considered by Lord Hale, as a kind “ of Tripartite Indenture:” there are other circumstances (as you will hear presently) that will justify this analogy, set up between the form of a Contract by Deed, and that by an Act of Parliament.

From this essential concurrence, in making of Laws to bind the Persons and Properties of the Subject, it is that Patents creating Forfeitures are void; that Ordinances are distinguished from Laws; that, in several Instances, things can not be done by Proclamations: it is for the same reason, that Ecclesiastical Canons, unconfirmed by Parliament, do not bind the Laity; because the King is the only part of the Legislature that has a share in passing them. It is for this reason too, that the King himself can not *dispense* with Laws, because, the King alone can not pass them: and (here as in private Contracts) nothing less than the power that creates the obligation, is sufficient to dissolve it. I think it very clear, from the grounds I set out on, that, in this respect, I speak only the genuine Language of the Constitution; without the least infringement of the Prerogative, which is a just and valuable part of it. This nice subject, I know, has, at times, been obscured by controversy; in this light it admits of none. I will not reason

reason upon it as a doubtful matter. The power of *Pardons*. which some have considered as Dispensations, and from an admission of this sort have argued to the admission of all others, does not apply at all. For this power is one of the antient Prerogatives of the Crown; and so far is it in its nature from a dispensation with a Law, that in most cases it is subsequent to a conviction by Law; and in no case disposes of any right vested in the subject. But I must again repeat it, that this power of the Crown is part of the Common Law; and, therefore, must, in all cases, stand its ground, as Common Law does, unrepealed by Parliament.

Besides, the notion of a dispensing Power, being so directly against the Constitution; there are other reasons deduced from the Constitution that cease to make it eligible in itself. The King has his remedy in the first instance: if he with-holds his assent, the Law cannot pass. And in this view, a dispensing Power would be wrong, as rescinding his own Acts; which is never done even in Grants of the Crown, where no Fraud appears to have been practised in obtaining them. And yet, in those cases, the Interest is only in the King, and the Grantee; whereas in Acts of Parliament, the whole Kingdom has a concurrent Interest with the King: and they (or their Representatives in Parliament) are makers of the Grant. I must close these observations with acknowledging, that they were never indeed more unnecessary than at present: and if the *Practice* of former reigns was never in danger of being mistaken for *Law* in the future, I would not have stopped to make them.

§. 31. I must now proceed a little more particularly to the Form and the matter of these Laws.

This concurrence of the three Estates of the Realm, which is so necessary to the validity of an Act

Act of Parliament; has, however, been applied in some cases (too severely, I will not say, but) too inattentively, as the test of the genuine nature of some antient Statutes. "Some of them, it has been said, run more in the Form of a Royal Grant, than a Public Law." Nay, to put the objection in the strongest light, we often meet with the very words, *Rex Statuit*, &c. in the beginning: which, it may be said, look more like the Acts of the Crown, than those of the whole Parliament. Those, who love to argue, may, perhaps, borrow a collateral circumstance in aid of this style of the Law; and tell us, that it was not only the mere Act of the King; but on *the Petition* likewise, instead of appearing to be the joint Act, of the Subject.

Before I give a substantial answer to this objection; as I imagine you yourself (if you sided with it) will allow, as every body must, from what has been said, that at this day, the national concurrence is really used in passing every Act of Parliament; let us compare the Form used at this day, with those of the antient Acts.

In every Act, passed at this day, we read, "It is enacted by the King, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, &c." "It is *enacted by the King*."—In this sense the Laws may be called, if you will, the King's Laws: but they are more emphatically styled the Laws of the Realm. Well, but let us weigh the force of the words "enacted by the King," and consider the present objection. If we were to stop here, it must be allowed the present Form would be exactly the same in English, that *Rex Statuit* was in the old Laws. What then is the conclusion? That we must, both in Antient and Modern Acts, look out for something further than these words,

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before their authority is admitted as decisive and incontestable: and at the same time, that these words are no more a diminution of the Legislative Authority of the Acts, in former Reigns, than they are of those passed at this day. As well may it be said, by the bye, that a Money-Bill, which always originates in the Lower House, is a mere act of one branch of the Legislature in exclusion of the other two, because it begins "We your Majesty's loyal Subjects, the Commons of Great Britain, have resolved to give and grant unto your Majesty the sum herein after mentioned."—But this resolution of the Commons is immediately succeeded by an application to the Throne to enact it into a Law: in consequence of which the enacting style runs, as it does in all other acts.

And so far from the *Petition*, exclusive of the words, being a support to this argument in Ancient Acts; many Modern Acts (and most Private Acts) have the very Language of a *Petition*, though it is not separate as formerly. Every Session you may still read in the Commencement of a Law, "*May it please your Majesty that it may be enacted:*"—then the King answers, "*And be it enacted*, by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons," &c. And where, after all, is there any thing, in the Form of a *Petition*, that derogates from the Freedom and Dignity of the Constitution? The Royal Assent must be asked in form or in effect to every Bill: when asked, may be either granted or refused. So that in reality, substance, and effect, a *Petition and Answer* must intervene between the tendering the Bill for the Royal Assent, and the obtaining the Royal Assent, in passing the Bill into a Law. But let us observe, at the same time, the Dignity and Freedom

dom of this Constitution is remarkable in this; that though the Royal Assent must be obtained to every Law that is passed, and the King is said to enact; yet that whatever he enacts, must be by the advice and consent of his People: and though he may refuse his Assent to a Bill that is tendered, yet he can make no Law that is not first tendered by them. In short, that he may always reject, but never does propose.

Getting rid then of this shadow of an objection; let us come to the substance. And here, consistent with myself, I shall own, that when any Act has not the concurrence of both Houses of Parliament, it ceases to be a Law. And in all these seemingly anomalous Acts, (of which Lord Coke gives many instances in the Prince's case) the Parliamentary consent, is to this day made the Test of their Authority; and it will always be found on the face of them, though it varies from the precise Form used at present.

Sometimes (as it has been well observed) the assent of the Commons is not mentioned in the Enacting Clause of Acts of Parliament, throughout a whole Reign; but only in the general Preface of all the several Acts passed at that time: and as the several Branches of the Capitular (if it may be called so) however distinct in their subjects, have "no break, or even any intervening punctuation on the Roll," they must necessarily have a reference to the Preface which declares their Enacting Authority. Sometimes the legislative consent is described by general words, "the Authority of Parliament." Sometimes by an enumeration of the particulars of which the Parliament consist. And in these recitals, I remember, Lord Coke says, an omission of one Estate is fatal. This variance is still more accountable, when we consider,

der, the Parliament itself was so differently described in different ages: it was called *Concilium magnum*—*Concilium fidele subditorum*—*Curia magna*—*Commune Concilium*—*Affisa generalis*.

The name of *Parliament*, it is said, came in with the Conqueror: and any one, who would infringe the authority of antient Acts of Parliament, since that time, because the assembly which composes it, is so variously described, may with greater reason deny the very being of any thing like a Parliament before that time: because there is no such word to be met with in our antient Annals. But such trivial variations in the style of the Parliament or the title of a Law, no more conclude against the authority of either, than the variety of places would, in which the one has, at different times, met to compose the other. The assemblage of the States of the Realm. as effectually formed a Parliament in early days, when they met in a Convent, in a Castle, or on a Plain, as when they became fixed at Westminster. We are too good Englishmen, I am sure, to dispute the validity of Magna Charta, because it was passed in a *Meadow*. In such cases, the only weight of the Argument lays in the bare sound of the words. Besides, we too have our collateral circumstances, as well as the objectors. Such Acts existing among the Parliament Rolls, the writ that issued to proclaim them being still extant, and many other nicer particulars might be alledged, if this argument wanted assistance; and they could be mentioned without speaking too much in the Language of my Profession; which I promised you I would not; though, I fear I may have partly transgressed already.

§. 32. I do not know how it happened, but I have in part taken you to view the inside of an Act,

Act, before we have surveyed the out-works. But as what I have said, arises from Form, it may be excused; though it is a Form that conceals something of the utmost consequence.

I need not dwell long on other matters of Form, the manner of promulgation, and the different parts of an Act.

Till the Reign of Hen. VII. (I think about the 11th) the Acts of the whole Session were proclaimed and registered in the County Court, in consequence of a Writ issued to the Sheriff: and any one might read or take copies of them. The Art of Printing being then pretty well established, superseded the old method of Publication. Convenience introduced this usage; though the old one is not altogether laid aside: something like the old one being still, in many cases, directed by the Acts themselves. As reading them at Parish Churches, Quarter Sessions, or Assizes.

An Act, however, was in force, before the Proclamation, or, as we may say, in larger terms, independent of it. This was expressly determined in a great Case, in Ed. III. time, cited by Lord Coke, to warrant the position. And Lord Holt, in the latter end of King William's reign, clearly admits (if he has not added to) the doctrine; by saying, that though Laws used to be proclaimed, "yet that was but an Act of Grace." Nor can it be said this was making a Law to be in force before it was promulged; which would be contrary to natural Justice: but it was, I conceive, the idea of the Constitution, that every man in the Kingdom was present at the making of the Law, either in person or by Representation; and consequently every one who was not actually present, might by the Representative be informed of the Laws that
were

were made. This idea still continues ; and its consequences seem to be the same. In fact, many an Act does commence before it is printed : and the general rule of Law is, that all Acts are in force immediately from their being made, unless any future time is fixed by the Act itself. The observation however, in the Law Books, that “all Statutes refer to the first day of the Session, unless it is provided otherwise in the Statute itself ;” I suppose relates principally to the manner of citing them in Pleadings ; so as to avoid the nicety and error in distinguishing one day of a Session from another. Can it mean that the Law should have a retrospective operation, by being in force the first day of the Session, when most likely it was not then in being ; and define the qualities of human actions by an *ex post facto* provision ?

These two Methods (of publication by Proclamation and Printing) considered together, account for our Statute Books going no farther back than Magna Charta, that being the oldest Roll remaining in the Tower. And yet on the other hand, the same consideration shews why many may be in private Books, that are not extant on Record or recognised in the public collection : as the first manner of Publication dispersed so many copies ; though the originals were lost or destroyed, copies enough might remain to continue them in print.

Printed Acts answer very well the common purposes of information ; but in some cases, it may be necessary to appeal to the Record itself. Where they differ, that will have the same preference as every original has to a copy : and the suspicion of incorrectness, is far from being ideal, as any one will see by looking over the Cotton Records ; and much later instances.

I proceed

I proceed now, in a few words, to the title and the component parts of the Act: and their relative force in constructions.

The title is now a kind of epitome of the Act, containing the general subject of it: and the Act itself is denoted and cited by the Reign of the King. The antient Statutes were, from some particulars in their Form, called Charters or Ordinances—some took their name from the place where the Parliament was held, as it was moveable in those days: as the Statute of Merton, Gloucester, Winton, Westminster, &c.—Some are generally known from the initial words, as the Statute of *Quia emptores Terrarum*, and of *Circumspecté agatis*. Many from the Subject, as the Statute of Fines, the Statute of Wills, the Statute of Frauds and Perjuries. The Romans named their Laws (you know) either from the proposer, as *Lex Falcidia*, *Lex Pompeia*, *Lex Cornelia*; sometimes from the Tribunes during whose administration the Law passed, (which comes nearest to ours) as the *Lex Didia-Licinia*; or from the Subject, as the *Lex Agraria*. From the first proposer we have none: it would little suit the nature of our Government, though it was well fitted to theirs. The King, by adding the Royal Assent, passes the Law: and by his Name and the Year of his Reign they are properly known. I can recollect but two instances of Acts that are known from private Persons; *Poyning's Law*, and the *Coventry Act*; and they are with far different views. I own, it is a matter of curiosity to know the particular occasion of an Act; or the first proposer of a Bill, which is afterwards enacted into a Law: but neither can be known from the Law itself. Considered as Laws, they are alike the creatures of public Authority; and

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“ as indistinct as water is in water*.” But these Laws, like Rivers which, when they fall into the Sea, become a part of that collection that invests the globe, are yet often to be traced to some private and far distant source; were once, perhaps, the first hints of a single person, though private wisdom at length is undistinguished and lost in public authority. And thus we may revere the memory of those, whom tradition hands down as the proposers of any Law: though we do not (as the Romans did) name Laws after them, or embellish their monuments with the *Legum Latarum tituli*.

The subjects of our Acts are often of a miscellaneous nature: and such are known in practice by the name of *Hotchpot Acts*. This practice, it seems, prevailed among the Romans, till prohibited by the *Lex-Cæcilia-Didia*, which Tully so freely censures, *Quæ legis sententia nisi hæc, ne populo necesse sit in conjunctis rebus complurimis, aut id quod nolit accipere, aut id quod velit repudiare?* This objection is prevented in our Laws by the manner of passing and promulging them. And with regard to prosecutions, where it would have most weight, each clause is considered as a distinct Law; and therefore, in this respect, “ He that offends in one point “ may not be guilty of the whole Law,” so as to be liable to the penalties of the whole.

§. 33. The formal component parts of an Act, are the “ Preamble, Enacting Clauses, and Proviso’s.” The *Title*, our books say, is no part of an Act, which made me mention it before I came to these.

This resolution of an Act into its component parts, is material in practice; because in construc-

* Shak. Anton. and Cleop.

tion these parts may either explain each other, when consistent, or controul when opposite : and greatly alter a construction founded on particular clauses only.

The *Preamble* (we are told by Lord Coke) is a key to open the meaning of the makers of the Law : and yet later authorities have been very far from considering it as the master-key ; which it cannot do, unless the Preamble was in all cases co-extensive with the Purview or Body of the Act. And it seems to be determined with the utmost propriety, that the Preamble shall not restrain the operation of the Enacting Clause. The intent of the Preamble is to shew the reason of the Law ; but there may be many very good reasons, not expressed, or appearing *ex post Facto*, to shew the utility of the Law, besides the particular mischief or occasion of the Law assigned in the Preamble. They will be so many justifications of the Legislature's wisdom and foresight.

The giving any reason for a Law, is a kind of indulgence ; it is painting Authority in the mild form of Persuasion : so your friend Tully has it—*hoc quoque legis putavit esse, persuadere aliquid, non omnia vi ac minis cogere.* But it would be greatly abusing this indulgence of the Legislature, to turn it against itself, by mistaking a command for mere advice.

Whoever is at the pains of looking back on the old Acts of Parliament, will meet with some Preambles of a very singular nature. I remember one in an act of Ed. VI. embellished with all the flowers of a poetical simile : another in Hen. VIII. envenomed with the acrimony of a Libel. So that if a Preamble in every case is to be considered as a key to the Act, it will, in some instances, be of as much use “ in opening the meaning of the Act,”
as

as the key of that tea-chest would be to the door of the House.

The *Enacting Clause* being the operative, vital part of the Law, must be considered, when we are quite clear of Forms.

The *Provisoes* or *Savings* of the Act, are (as their name implies) exceptions of particular cases, from the generality of the Law.

I will make only two observations on these formal parts of a Law : 1. That they are all so many additional forms, unknown to antient Laws : a tendency towards perfection that can only be the growth of time. No Act, it is said, had a Title, of the present kind, 'till 11 Hen. VII. Preambles begun to be constant about the time of Ed. III. and Provisoes are of no very long date. 2. That an Act of Parliament thus analysed into its parts, is in this respect also, like a Deed ; the Premises correspond with the Preamble ; the Habendum, Clauses of rent, are, we may say, its enacting part ; and the Condition and Exceptions of a Deed, are like the Provisoes of an Act. Nor is the pursuit of this analogy altogether fanciful, the rules of construction having often the same agreement as the parts themselves.

Thus an implication only in the Premises shall no more controul the Habendum, than a particular Preamble shall a general Enacting Clause ; and a Condition or Proviso repugnant to a Deed or an Act, is equally void. In a Deed, as well as in an Act of Parliament, Form has been the growth of time. Whoever compares the parts of a Deed, as modelled in the first institute, with the antient Deeds in the *Formulare Anglicanum*, and other books of antiquity, will see the novelty of many of those parts ; and admire the simplicity of our Ancestors. There is one thing, which, perhaps, you will be surprized

surprized at, and after all forms mentioned, think an Act is very deficient in, that *no Act of Parliament*, I mean the original Roll, *has any stops or paragraphs*: so that any argument drawn from the influence the stops have on the sense, or any alteration in the legislature's meaning, occasioned by dividing Clauses, falls to the ground; and is to be imputed to the invention or mistake of the Printer. And indeed unpleasing to the eye, or disgusting as the want of these would be in the generality of printed Books, they are necessarily omitted in Deeds and other Records as well as in acts of Parliament.

§. 34. I am now at length come to the *subjects*, and other material qualities, of Acts of Parliament, and shall then conclude with some of the most general rules of construction: as to which, I must remind *Policrites* beforehand, that my engagement with you, *Philander*, discards all those subtleties that have crept into our Law Books, about pleading and reciting them: much less shall I be expected, even in the compass of these observations, to be as full and precise in discourse, as I would in an express treatise on this subject.

The most popular division of Acts of Parliament, I can think of, arises from considering them as public or private; temporary or perpetual; remedial or explanatory; in affirmance or in derogation of Common Law.

The distinction of Acts, as *Public or Private*, regards rather the difference of the object, than the extent of the obligation. And it principally affects their notoriety, evidence, and manner of being recorded. That is to say, Private Acts are not printed in the Statute Book, are not the immediate objects of judicial knowledge, nor inrolled in Chancery as the Public are. But this distinction introduces no inequality with respect to their binding power.

power. On the other hand, though some Acts do, in reality, extend their obligations much further than others; yet, upon that account, they make no part of the distinction here laid down. As for instance, an Act that binds *Ireland* or the *Plantations*, and another that binds *England* only, are equally public Acts.

Acts that immediately concern all the people, are said to be public Acts: and therefore, those Acts that relate only to particular places, and to particular persons in a private capacity, or to one species of the Community in a Politic capacity, are, in their nature, Private Acts of Parliament. This definition, which I have collected, not without some pains, from the infinite variety of cases in our Books, will, I hope, prove adequate and comprehensive. You will easily understand by it, that some Acts as to particular clauses, may be both public and private. As the Statute of King James, that disables all Popish Recusants from presenting to Livings, is a public Act; yet the clause in it, that gives their Presentations to the Universities respectively, is in its nature private: and must be pleaded or expressly found in order to be taken notice of by a Court of Justice. So the Clause in the Act, passed the other day, for securing the property of Mr. *Hogarth's* prints to his Widow, it is evident, is private; but the Act itself, made to amend and effectuate the Act of the late King for the encouragement of the Arts of Designing and Engraving in general, is in its very nature, a public Act.

The distinction itself, between public and private Acts, was introduced in the reign of Richard the Third: private Acts being then first ranged by themselves. At this day, many Acts private in their nature, are expressly declared to be public; which

which circumstance communicates to them the judicial consequences I have already mentioned ; but does not give them a place in the Statute Book.

§. 35. The next light in which I proposed to view Statutes, was as to their duration ; they being either *perpetual* or *temporary*. Generally speaking, an Act, when no time is fixed for its commencement, is in force as soon as it is passed ; and when its duration is not limited, is in its nature perpetual. So that it must either expire in point of time, or be repealed by a subsequent Act, before its obligation can be discharged. It is plain then, Time alone, that weakens most things, will, of itself, not affect an Act of Parliament. Every body knows there is a Statute passed in the reign of Ed. III. as fresh in its obligation, as if it was passed at this day. Nor will bare want of usage, any more than length of time, be able to repeal an Act of Parliament. Time, and the Manners of the Age, may change the situation of things, and the objects of an Act may vanish : and then the provision of the Law must cease. But while the objects of an Act continue, the Act itself remains in force.

And this, it may be observed, is the case with the Common Law itself. Many of the old modes of proceeding are disused, because others, more suited to the times, are come into their room : but the others are not abolished ; because immemorial usage, uncontradicted by parliament, remains Common Law. Thus (Policrites will remember) most of the real Writs have fallen into disuse by the practice of Ejectments, the great use of Personal Actions, and practice on Motions. Thus Villenage, Trial by Battle, Wager of Law, and Attaints, have long been disused ; but were never, that I know of, abolished by Law.

§. 36. The

§. 36. The third distinction I mentioned was that of Statutes considered as *Remedial* or *Explanatory*: either as they are introductive of a new Law, or declare, explain, and confirm an old one. This distinction must be confined to Statutes, compared with one another; or it would anticipate what I have next to observe. I need not enlarge upon it, at present, because it is easily understood with its consequences.

§. 37. The capital distinction, which I have reserved till last, is either as Statutes are in *Affirmance*, or in *Derogation of Common Law*. It is this distinction that furnishes many rules of construction.

Many of the old Statutes (it is well known) are no other than declarations of the Common Law. Such are the great Charter, the Declaration of Rights, 1 Will. III. with many of the Statutes in Ed. I. reign; and numberless others, both Antient and Modern. A Statute that is affirmative only, does not take away Common Law: the Common Law, therefore, notwithstanding a new remedy given by Parliament, still remains, unless there is an express or implied negative; and the right in a course of Justice may be asserted, either in the beaten track of the Common Law, or the new Parliamentary Mode of Proceeding. But affirmative words in an Act of Parliament, do always repeal any former Provision or Mode of Proceeding in a former Statute, where they are in their nature inconsistent.

There is that great simplicity and plainness in the Common Law, that Lord Coke has gone so far as to assert, (and Lord Bacon nearly seconds him in observing) that "he never knew two questions arise merely upon Common Law; but that they were mostly owing to Statutes ill-penned and overladen with Proviso's." This observation, even

even at the time it was made, does not seem altogether just, if it means to ascribe the multiplicity of questions principally to the inaccuracy of the Statute Law: for some that have been penned in the plainest language, have been productive of as much controversy as any. The truth is, it is not in the province of language, or human penetration, to exclude doubts, ambiguities, or evasions; where people think it their interest to make them. A more curious and endearing observation to recommend the Common Law, the same author has given us; when he says, that though in some points the Common Law has been altered by Acts of Parliament; yet in revolution of time, the Common Law has, in those very points, been restored to avoid inconvenience. A most forcible, tho' silent panegyrick surely on the wisdom of our Ancestors, in framing their legal Constitution, when Time itself sides with Antiquity; and regulations after having laid dormant for ages, are thought necessary to be revived!

§. 38. These observations, you will allow, extremely well justify the great rule in our Books, that makes the *Common Law the basis of construction* in all cases whatever; that supposes the Common Law to subsist, where it is not expressly or virtually repealed; and by these means makes one consistent harmonious System of the whole Law. Another rule, which is nearly of the same import, is, that all Statutes made in *pari materia*, shall be taken together in construction. Thus the Bankrupt Laws, the Poor Laws, the Game Laws, are respectively considered as making each so many separate Systems.

Many rules of construction are derived from the distinctions I have mentioned; but are too minute and practical, to trouble you with.

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The only great and general rule of construction, I shall add, is, that the sense of every Act, and every Clause in it, must arise from an accurate review of the whole; and from the spirit rather than the bare Letter of the Law. When the meaning of the Law corrects, restrains, or enlarges the words of it, we call it an equitable construction. And this is an *Equity* that has been known in all ages, and countries, in the construction of instruments: and is almost the only one that Courts of Law are acquainted with. It has been touched on in many of our Law Books; but no where better than in Plowden. The meaning of an Act, he calls the "Soul of the Law;" and compares an Act of Parliament to a Nut: (I see you laugh at the good old Sage: he means a Nut, *not in size but in solidity*) of this Nut, the sense, he tells us, is the *Kernel*; the Words are only the *Husk or Shell*.

The only authentic channels of Interpretation are the Judicial determinations of the Courts at Westminster: concerning which I shall be under a necessity of saying a good deal hereafter, as I am apprehensive what I have been saying, may go for nothing, if their nature is not more thoroughly explained than I have ever yet seen it. There are other helps to the construction of Acts, of private use rather than of public authority. Such are those pieces, formerly in great vogue, called "Readings;" and such too, in many cases, are the history and manners of the times.

§. 39. After this particular account, I shall make but two observations. 1. Concerning the objects of our Laws. 2. Concerning their Sanctions.

It is extremely clear any thing may be enacted by the Laws of a Society, that is not contrary to natural Justice. And yet we shall find many Governments are more minute in explaining and defending

fending by Law, Political Rights, than the Rights of Nature. The truth is, the former are the mere creatures of positive Laws; the Rights themselves are created: in the other, positive Laws only give additional Sanctions. This is remarkably true in our own Laws.

Imperfect natural Rights are very little the object of Laws. The *Athenian* Law punished idleness at large: our own, only as it affects Society by example, or in its consequence. So of Drunkenness, in the bare commission, and other vices, that affect principally a man's self. The Athenian and the Roman Law both punished Ingratitude: this is a kind of Law unknown in our own State. I wish we could say as the Spartan, in Plutarch, did of Parricide; *we have no Law against it, because we have no such thing*: but though the thing itself is too well known in every Country; with good reason, we have no Law against it: for a Law of this kind, must leave every thing to construction. In all crimes, the guilt arises from the motive of acting; but the motives, in these cases, could not so easily be inferred from the fact.

Sumptuary Laws, as they are called, make a large head in some Systems. Our own are very sparing in this respect: formerly there were restraints of excess in apparel, diet, and retinues. And yet, however agreeable to reason and morality, such prohibitions are, in certain circumstances; it seems better in general, in a State like our own, to leave them to Reason, than restrain them by Law: because such Laws, by restraining Commerce, introduce greater public inconveniencies than they can prevent by restraining, in particular instances, the excesses that may be the consequence of Commerce. In a small State indeed, where its situation exposes it to invasions from without, and

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which has very slender or no resources from its commerce, sumptuary Laws are necessary to its very existence; as for instance, in Sparta of old; and in the Swiss Cantons, and Geneva, at present. In such states it ought to be with the community, as it ought to be with a private person of small fortune; Tully's *Vestigal Parsimonia* should be a sacred maxim: persons in such circumstances should compute their riches by their own moderation; and as the wife's fortune is humourously reckoned up to the Miser in Moliere, by her habit of virtue in sparing those expences which she could bring him no portion to supply.

Formerly, Flattery and Lying were punishable: but they carry their own punishment with them, by contempt and incredulity for the future. In all these instances, *Religion* much better supplies the place of Law: it reaches the heart, where the Law can only regulate the actions, and those actions only that more immediately affect Society. It has the Rewards and Punishments of *another World* for its Sanctions, when Human Laws can have only those of *this*. Happy, therefore, it is for a Nation, when Religion co-operates with Law; and where, as with us, it is of the most excellent kind; and is established by Law, in its utmost purity, at the same time it strengthens and enforces the Law itself.

§. 40. And without the aid of Religion, our Law (as indeed all positive Laws) would want one of its principal Sanctions. *Rewards and Punishments* have been by many Writers on Natural Law, considered as the necessary guardians even of Laws themselves, as they are of Society. And yet, Positive Laws are, in themselves, very deficient in one of these Sanctions, though large enough in the other.

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The necessity of Penalties is so obvious, that no Law is without them : and the more free the Government is, the more exact will the Law be in defining them. Our own Government is remarkably precise ; the Punishment for *Crimes*, is, in most cases, as fixed as the ideas of Crimes themselves. And the Punishment of *Misdemeanors*, as distinguished from crimes strictly so called, is rather discretionary, as to its quantity, than arbitrary in its nature. For even in the old Statutes, where it is Enacted, that an Offender shall be “ punished at “ the King’s Pleasure ;” the natural import of the expression has been restrained in Construction, to mean the Pleasure of the King, as exercised, in his Courts of Justice, by the sound discretion of his Judges, who are upon oath. And this discretionary power, as to the quantity of the Punishment, in opposition to a Sentence fixed by Law, seems best left to a Court, in cases of Misdemeanors, for two reasons ; to adjust the Punishment to the circumstances of the Offence ; and the quality of the Offender.

But *Rewards*, which several writers have considered as another inseparable Sanction of Laws, are very little known in our system. There is, indeed, an implied Sanction, which, though greater than any positive one, is not what such writers would mean ; that is, the protection and immunity of Civil Government, the consequence of Obedience. This, it is true, belongs to all Laws, but is found, in Practice, to be too weak to answer the notions of a Sanction : as weak as the natural Sanctions of Virtue and Vice, arising from the happy consequences of the one, or the ill consequences of the other, to the health, fortune and tranquility of Moral Agents. This shews therefore, that Civil and Moral Virtue, to be firm and unerring in their

course, however they may accidentally separate in their passage, must both flow from the same great source, and ultimately terminate their view by the same great object ; the principles of Religion, and a future State.

But notwithstanding the weakness in the influence of implied Sanctions, Positive Rewards for the obedience of Laws, are, in very few cases, provided by our Laws : principally (I think) in those extraordinary cases, “ where the execution of the “ Law creates particular difficulties, and at the “ same time, the neglect of the Law could not “ easily be punished.” For instance, the Law gives a Reward to those who apprehend a Highwayman, or a Penalty to an Informer. Every man, by his connection with Society, is obliged, by the fundamental Contract, I may say, to bring a Rogue to Justice ; Policrites has shewed, from *Cæsar*, that our Ancestors had an early notion of this duty in some important cases, and made a Law for it. But every body knows, the difficulty and danger of doing it would, in most cases, over-balance the natural motives of Obedience : and many an opportunity of doing it might be lost, without any evidence for the Law to impute to a particular neglect. It is, therefore, prudent of the Law to encourage its own execution, in such extraordinary and unequal circumstances.

What has been hitherto said of Rewards, must be understood of them considered as they are one of the Sanctions of Laws : and with us there are very few of this kind. It will, indeed, be some satisfaction to think they are but few, if there is any truth in the celebrated Montesquieu's reflection, “ that great Rewards are a sign of the decline of “ the Government ; because they are a proof of “ its principles being corrupted.” But in all Governments

vernments it is proper there should be a Power lodged somewhere, of rewarding extraordinary Services to the State. That Power, with us, is left to the executive part of Government, the Crown (unless we should except Rewards proposed by one or two Acts of Parliament for some discoveries in Science). And whether Rewards for public services appear in the shape of Ribbons, Peerages, or Pensions, they all flow from the extraordinary Grace of the Crown, very properly stiled, in our Books, the Fountain of Honour. I have now done with the principal Heads of our Law.

P H I L A N D E R.

But not a word have I heard of those interpretations of the Law, of which you seemed sensible there is a necessity of saying much in vindication, and in which I heartily concur with you, as I have known many, as little versed in Courts of Law as myself, look upon them in the same light as the Lady of the Manor's Attorney, who to comfort her "for not being able to alter the Law in her favour, "assured her, however, he could at any time prevent its taking effect."

E U N O M U S.

By the interpretations of Law I alluded to are meant *Judicial Records*, which, I before hinted, were the Evidence of Common Law, and the Exposition of Acts of Parliament. Policrites will observe I have not spoken in conformity to many of our writers, who consider these as one branch of Law; which in themselves they are not, but refer to a preceding Law, and bind only the Parties, in each

each particular case, as an authoritative exposition of the Law; whether the case arises on the Common Law, or on an Act of Parliament. For no determination of one Person's case, though its circumstances should exactly concur, is so directly binding upon another, as to subject him to Punishment, for not obeying or acting according to it. But as it is probable succeeding Judges (bound on Oath to determine according to Law) will give the same Exposition of the Law, where similar circumstances do occur; that determination in one person's case, may in its consequence be a Punishment if not obeyed by another; by putting him to the expence of contesting a matter already settled: and, therefore, it would have been but prudent, where the circumstances are exactly the same, to have acquiesced in a former determination, because that determination has made the *Law known*, in such particular circumstances.

This account of Judicial Decisions, I think, agrees with Lord Hale's meaning—He, it is true, ranks *Judicial Decisions* as one *Constituent* of the Common Law; but soon after adds, that though they do bind as a Law between the Parties, in a particular case in question, till reversed by Error or Attaint, yet they *do not make a Law*, properly so called. And though such Decisions are less than a Law, yet they are greater evidence of it, than the opinion of any private persons, as such, whatsoever.

§. 42. This account, though it may have detracted from them, in the opinion of some, will be sufficient to raise them in the opinion of others; who dispute both the authority and the use of Judicial Precedents. I wish, for the Writers sake, such notions had place only in works of pure Fiction, such as *Swift's Voyages*; for Truth will not easily be laughed out of countenance: but they
have

have been attacked with more severity, under the plausible colour of cool Argument. Some object to the use of any precedents whatever: others to the uncertainty and contradiction of them.

The first are answered by what has been already said of the nature of Judicial Decisions: "that they are Expositions of the Law, as it stands when the case happens." It is the business of Judges *jus dicere*, not *jus dare*. And why should not similar cases have similar Expositions?

There was a time, undoubtedly, when these precedents were first formed; and the Decision was simply founded on the light of Reason and the circumstances of the case. We scarce need be told by Spelman, "that in early days the Sages of the Law judged many things *ex æquo et bono*;" and their Judgment afterwards, as the *Responsa Prudentium* among the Romans, and the Theodosian Code, became Precedents of Law to Posterity. Cases will often still occur unlike any determined, and are, therefore, without Precedent: others will happen like these, and then these will be the first Precedents in their turn. But though every Precedent must have a time to begin, that Chief Justice argued very ill, who admitted a Jury, not Freeholders, in a capital case, and said, *why may we not make Precedents as well as those that went before us*. Because his Precedent was so far from being new, or *ex æquo et bono*, that it was contrary to settled Law, from the first age of the Constitution. That Chancellor too, who would have advanced the King's Proclamations into Laws, on the maxim of all Precedents having a time to begin, argued as ill; and was told so with spirit, by Lord Coke, in King *James's* presence.

And this gives me an opportunity of overthrowing a notion that has crept into our Books, that,
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when a case arises that is without Precedent, the bare want of Precedent is a great argument of its being against Law. That opinion is now disregarded: every day new cases arise, and are determined on their own reasons.

Indeed the contrary would be to suppose, 1. That Reason had nothing to do with Law. 2. That a Right might exist without a Remedy to support it. The true Limitation, I take it, is this: in a case that must have daily happened, the want of Precedent is a great Argument; but in cases, where the circumstances could hardly exist, it is none at all.

The Determination will, in the latter case, be, as Spelman says, *ex æquo et bono*; and if a case, similar in point of circumstances, does occur hereafter, that case will, if remembered, be made use of as a Precedent.

§. 43. Those who object to the uncertainty of Precedents, founding their objection on some appearances of truth, are better intitled to be heard; but there is some fallacy in this way of arguing. They take Judicial Decisions, and Printed Cases, as equivalent and synonymous; which, it may be easily shewed, are by no means the same: and yet, these latter are the great source of the uncertainty and contradiction complained of. But whoever first confounds them together, and then draws a conclusion as to the uncertainty of both which flows only from one; might as well mistake the confluence of two Rivers for the source of both: or might as well urge that there is no such thing in nature as fact, because different persons in their account of the same fact give such various and often contradictory evidence.

Judicial Decisions are properly the Precedents: and Records alone are the proper Warrants of their authority.

authority. Printed Cases, as the channel of communicating these decisions, whatever use they have in other respects, have no internal authority, but as supposed copies of a decision on record. But printed Cases in Reports, though inferior in authenticity to Records, have yet many advantages: 1. That in a short compass they contain the most important decisions of many ages: the Records are so numerous, that it is impossible and useless to transcribe, read, or consult them for any time. 2. The Records are the bare naked Decisions, and contain only the formal entries of Pleadings and Judgments; whereas the Reports contain, in many important cases, the arguments offered to the Court on both sides; and the reasons which determined the opinion of the Court on that side on which the resolution turned.

An accurate account of cases of weight and difficulty published by persons, from what arose within their own experience, can want no recommendation with the Profession; or indeed with any men of Sense. And the *good old Judge*, whom I have often heard condemn from the Bench, as he has since done in print, many of those crude indigested performances, affecting to be called Reports, which were, perhaps, nothing else than, as he expresses himself, "the rummage of dead men's papers, or the first essays of young authors," has yet allowed a good Reporter to be a *real benefactor to the Public*. He himself (if considered in that light only) has been a considerable one.

But many Reports may be considered in another point of view, and rather out of the direct track of the profession: as many of the more modern contain excellent pieces of legal reasoning, and which are capable of entertaining any one, of a liberal education. with the smallest insight into such subjects.

subjects. Such are particularly Sir B. Shower's Cases in Parliament, and the Reports of Vaughan and Peere Williams. No doubt of it, Reports, like all copies, must be greatly inferior to what the Originals were. We are even told, that many of Tully's orations are, in this respect, considerably defective; at least abstracts, rather than copies, of what he spoke upon the occasion. Lord Bacon thought the method of reporting in his time, too jejune and imperfect; he particularly censures that of Sir Ed. Coke, as too compendious a form of reporting the resolutions of the Court; and not sufficiently "tracing out a form of argument:" it was this consideration that induced him to leave us those excellent specimens of his own; which method has been, in many instances, followed in later times.

§. 44. The principal Reports exist in a continued series from Ed. II. to the present time; extremely numerous and defective: and (if some were excepted out, or perhaps some cases only in most of them) are chargeable with containing, if not of being the source of, all that uncertainty which some are fond of objecting to legal determinations. Originally they were collected and published "annually," by persons appointed by the King, and thence acquired the name of "Year Books." This method was attempted to be revived in the reign of King James: and there is an ordinance to be met with dated the 15th year of his reign, directed to Lord Verulam (Bacon) and Sir Julius Cæsar, vesting in them the appointment of two persons, with a salary of 100*l.* each, and other particulars, as may be seen at length in the Record in Rymer's collection. Lord Bacon seems to allude to this in his proposals for the amendment of the Law: and this likewise explains some passages in his Letters,
lately

lately published. I do not find this method continued long: Hetley's Reports, however, from the title, seems to have been taken in virtue of this appointment.

The want of this provision; if it is at all to be regretted, is less so, since that time: there being many co-temporary Reports, that give a tolerable account of transactions in Westminster-Hall, from that period. The general authority of Reports is now derived from the *Imprimatur* affixed to its title-page. This manner of stamping an authority on Law Books, (though the practice of licensing was derived from the Inquisition, and applied here first to books of Religion) seems to have succeeded the appointment of Reporters. It was first done by the Lord Chancellor alone. But about the latter end of Car. II. time, by the twelve Judges. The *Imprimatur* is usually preceded by a testimonial on personal knowledge of the Reporter's general character in his profession; but that (like other general characters) neither supposes the work free from faults, nor excuses what is faulty; for after all, as I have said, the Report of one particular case, stands its ground only as it is supposed agreeable to the Record: wherever it appears to vary in substance, it loses all its authority.

§. 45. The essentials of a case well reported, seem to be, A true state of the facts; The true point before the Court; The manner in which it came before the Court; The true Determination; The Name and Date.

You sometimes hear of Manuscript Reports, which have their use, though they rest only in private hands: because they are chiefly Cases within time of memory; and because they serve as a Memorandum to point out the Record of a Case,
the

the determination of which might otherwise have laid altogether dormant.

§. 46. I now come to answer the objection to the uncertainty and contradiction of Precedents. And it has been already hinted, 1. That this uncertainty is occasioned chiefly by the defect of *printed Reports*; and arguing from cases unlike, as if they were alike, 2. I shall admit however that, sometimes, the same points have been long agitated, and remained unsettled; and will take occasion to mention a word of Precedents *sub silentio*.

The greatest and almost general defect of Reports, is the want of a just and full *State of the Case*. The Law, in every case, must arise from an entire attention to the Facts, which are the ingredients of the Case. And it will unavoidably happen, that those who report Cases, which they barely hear, and have no concern in, must often omit many very material circumstances of the Case; and sometimes insert others that are not material: the Facts being often so complicated, that, exclusive of other disadvantages, no attention can master them all at once. Hence it will happen, that such Cases must be reported in a more loose and general manner, than the Facts admitted; and by those means, the special grounds of the determination not being known, the determination will be cited, as a *Case in point*, hereafter to other Cases (if the whole was known) very unlike. This happens most frequently in opinions on *Devises* and *Settlements*. Lord Coke has gone so far as to say, no Case is exactly like another in all its circumstances. And yet, a Case determined may be made use of as a Precedent, without being exactly alike in all its circumstances: the material circumstances may be the same; or they may be made use of as far as they go.

It

It is partly owing to the variety of circumstances, in different Cases, and at the same time confounding different Cases unlike, that a few words in an Act of Parliament, have often furnished so many, and often seemingly opposite, determinations. Of which scarce two lines, in the *Statute of Frauds and Perjury*, and as many in the Stat. of Wil. III. on *hiring and serving for a year*, both of them penned in as plain words as the language admits of, have furnished, I may say, enough for a folio volume.

2. I must admit, indeed, some points were for a long time altogether unsettled, and as it were fluctuated between contrary opinions of Courts. Such for instance as, whether in case of a Legacy, and an undivided Surplus, the Executor or the next of kin, is entitled to that Surplus? Whether reversionary Terms for raising portions should be sold during the Jointress's life? Whether an Estate to a man for life, Remainder to the heirs of his body, gives an Estate Tail to him or not?

Such questions, you see, concern rules of Property; and it is of the utmost consequence, that points of that nature, once determined, should be acquiesced in: for the inconvenience of shaking settled determinations, is much greater to the kingdom in general, than the impropriety of any former original determination can be to the Parties. Lord Macclesfield used to call it removing Land Marks. Indeed, a point of Law settled answers Virgil's

Limes agro positus, litem ut discerneret arvis.

It is in this view too, that Courts have said; It is often of little consequence, how a point is determined at first, so it is but adhered to: then the Law will be known; and the inconvenience, by being foreseen, may be avoided.

After

After all, some allowance is due to human infirmities : men, as men, will differ in opinion. Every man can not be right; but every man must be saved by his own conscience. The greatest men we have had, have been most forward to make these apologies for human nature, though they have least need of them. *Policrites* will remember, what Chief Justice Vaughan, in *Bushel's case*, and Lord Nottingham in his own famous argument, have so finely said to this purpose. And what those who now preside are more fond of owning with much less occasion.

§. 47. Besides what has been said of *Precedents*, you will sometimes hear of *Precedents sub silentio*; but these are opposed to *Judicial Precedents*, and mean nothing more than a silent, uniform course of practice, uninterrupted, but at the same time unsupported by legal Decisions. Where practice is uniform, and not contrary to Law, it will have great weight; so will the single opinion of eminent men in the Profession. These are ranked among Lord Coke's topics of Legal Reasoning; and I remember were greatly relied on, upon a late occasion, in the exposition of the Statute of Uses relating to an Infant's barring herself of Dower.

But if mere Practice; or *Precedents sub silentio*, were to prevail against Law, then, as has been justly said, "Clerks in an office would make Law;" and would have it in their power to repeal Laws in being.

§. 48. If, from what has been said, I was to form a *Scale*, by which the Authority of Legal *Precedents* might be measured; the *Precedents sub silentio* would obtain the lowest place: next above these (but so much above these, that, in comparison, the first are almost as the freezing point

point in the Thermometer is to the Spring temperature) I consider an opinion of a single Judge at *nisi prius*, on a point directly in question: then, higher up the Scale, the Determination of any one Court in Westminster-Hall: much higher than this, that very Determination confirmed by another Court on Writ of Error: and the highest of all, the Determination of the same case, on a Writ of Error in the House of Lords. This last has the highest place imaginable in the Scale of Judicature; and affords evidence of Common Law, or of the Exposition of an Act of Parliament, no way inferior, in point of authenticity, to the express positive text of an Act of Parliament itself.

Thus have I finished on this head.

PHILANDER.

§. 49. And you have reconciled me much to a part of the Law, which I, who am a stranger to the subtleties of your Schools, have ever looked on as of the very essence of Cavil: but I still have some difficulties, which to one so far a convert, you may easily clear. Admitting an uniformity and adherence to Precedents are observed in one Court: how is it that a Court of Equity is set in contradiction to a Court of Law? That points solemnly settled in a Court of Law below, (as I think you call it) shall be reversed on appeal to another Court of Law? Nay, that even in the same Court, the effect of a trial, by Jury, shall be overturned by matters arising after it?

EUNOMUS.

Upon my word you have drawn up your forces in great order; but you are not aware, how much
time

time it will take to go through even this mock Campaign. I must deal fairly with you; you must attend to the different Provinces of different Courts: in what manner they assist, controul or depend on each other. You must be led too in a beaten track about Juries, to settle the meaning of what may be said in answer to what you urge.

PHILANDER.

We have a great part of the morning before us: take it all; especially as you have promised me satisfaction on a subject, which always fires the blood in my veins; concerning a blessing to this Country, which I have often pitied the want of in other nations; and am sorry to see any diminution of at home: I mean, what, from my earliest knowledge, I have been taught to revere as an Englishman's Birth-Right, *Trial by Jury*.

EUNOMUS.

§. 50. I will begin then with that: and will attempt to shew you, that this form of trial has, in the course of time, been greatly improved; nay, if any prejudices you may have formed are suffered to sleep 'till you have heard me out, even improved in those instances in which you seem to think it impaired.

I will not expatiate on the antiquity or excellence of its original. As to both, it is sufficient to say, "*Caput inter nubila condit*," its original is obscure; but it is the noblest form of policy that was ever invented on Earth, and (may I add?) comes nearest the impartiality of Heaven. I do not know any Country that pretends, in the least, to share it with us, except Sweden; from whence

we

we are supposed to have borrowed it: which notion, entertained by some of our Travellers, is refuted by two observations: 1. That their plan of Juries disgraces ours by comparison. 2. That Juries existed in England, long before England probably had any knowledge of Sweden: before those great inundations of the populous North, as it were, deluged this Western world.

But excellent as this form of trial is in England, as it consists of men, it cannot pretend to absolute Perfection. Bodies of men, like individuals that compose them, are liable to be influenced: a Borough and a Jury may both be occasionally corrupted. But, in the nature of things, numbers are a security: and in the case before us, twelve are more likely to form a right Judgment of Facts, and to give it with impartiality, than one man.

The probability is still more on the side of truth from this quarter, when it is considered, what pains our Ancestors have taken, from age to age, to reform the model itself; as well to guard it from every natural bias, as to give it every possible advantage. I meddle not, at present, with those incapacities that Reason points out, and the Common Law has ever adopted: such as proceed from a defect of the understanding or a depravity of the will. The positive qualifications are more within our view; because these have varied greatly in course of time; as it is, indeed, of the genius of positive Laws, to conform to the convenience of the times.

The old Statutes required Jurors, in general terms, to be "next neighbours and most sufficient." It would have been impossible, without that nice division of Lands into Counties, Hundreds, and Villages, and at the same time a free
 X distribution

distribution of landed Property, to have found twelve men equally qualified, in point of vicinity, and of freehold Estate. Those two qualifications, however, so excellently fitted to the office of Juror in early times, and so closely connected, have now parted at the greatest distance: the vicinity reduced, in common cases, to a shadow; the qualification, in point of interest, swelled to what would have been a Prince's income in those days; that is, *Philander*, in the idea of those who are governed by words; for in reality, I think, the respective times being considered, the qualification may be considered in both cases, to be pretty near on the same foot. I will just deduce the alterations in their several periods; and will then remark the consequence of the alterations.

The provision that Jurors should be *next neighbours*, though, a favourite caution of the Common Law, rested on a very vague description; and in time was found very inconvenient. The Statute of Hen. VIII. brought it down to six of the same Hundred, where the fact arose; another Act in Q. Eliz. time reduced it to two Hundredors; the statute of Q. Anne makes an end of all Hundredors, and requires the Venire or writ to summon them to be awarded from the body of the County, except in certain criminal cases: though by construction, the practice *sub silentio*, I was speaking of, was soon set up as a reason for keeping the Jury, in all Crown Prosecutions, still within the pale of the same Hundred.

You see then, how this qualification has given way: and greatly to the public advantage, in opening a more free course of Justice; as Jurors may much more easily be had from a County, than an Hundred; if the part is not equal to the whole, as I suppose you allow it is not. And with respect to the advantage arising from the knowledge of Places

or Facts in question, though at first sight that may be peculiar to those who are “literally next neighbours;” the answer to that is, 1. That the notion of a *View*, or opportunity given to some of those who are to try the cause, to see the spot in question before the Trial, is now, and long has been with regard to the knowledge of Places, a fair equivalent to the subject, in lieu of the provision of Vicinage at Common Law. And *six who were on the View*, who must be at the Trial, will be of much more service, than *six barely of the same Hundred* would be. 2. But even still by Lot, there may be some of those who are literally next neighbours.

And by relaxing the restraint (as I shall now call it) of that qualification, we have got other material advantages. Consistent with the rigour of that qualification, it was impossible to try Facts done beyond the Sea; which now by an easy Fiction of placing a Plantation in an English county, may be tried in Middlesex, as well as if the Fact arose there.

It laid too a terrible restraint on Courts themselves: the Jurors being next neighbours were supposed always to have evidence in their own breast; the consequence of which, in many cases, produced this disagreeable alternative; either that a verdict must stand, though contrary to the clearest evidence produced in Court; or the Character, nay, the Liberty of the Jurors, were to be overturned, together with the Verdict, by attainting the Jury. Now the Jurors are no longer of the neighbourhood, the supposition derived from thence must fail; if they judge apparently wrong, that Judgment of theirs may be corrected, but it will still be by another Jury: so that the injured Party will not suffer; nor will the former Jury suffer for their wrong Judgment, as they might sometimes have done in the perilous days of Attaint; nor will the

Constitution suffer by dropping a Jury. Upon the whole, I conclude, that this alteration is much for the better; that *new Trials* and *Views* are more than useful substitutes for Vicinage.

Having thus done with the first early qualification of Juries, respecting their *vicinity*, I must say a few words as to their *sufficiency*. Their qualification, in point of Interest, was originally but small: in 13 Ed. I. time, only 20s.; in the 21 Ed. I. it arose to 40s.; so it continued till Q. Eliz. with one alteration only in the interim, of inserting the qualification in the Jury process, which, I think, arose from the Statute 35 Hen. VIII. In the 27 Eliz. it arose to 4l. Freehold; in 16 and 17 Car. II. it swelled to 20l. Freehold; and yet, notwithstanding this great advance in the qualification, let me just observe, Juries were never so packed and practised upon in criminal cases, as during the latter end of that reign, and the beginning of the next. In 4 and 5 Will. and Mary, it came down to 10l. and has continued so ever since. Except in the case of special Juries, which, by a Statute of the late King, must have 20l.

You know Leaseholders of 50l. clear yearly value, are now qualified as Freeholders. The reason why the Law required *Freehold* Interest formerly in exclusion of *Terms*, was, because Estates for Terms of Years, till within these two centuries, were very short, and of no consideration in the eye of the Law. The other being a certain provision for life, was a more sure barrier against temptation. 2. Most questions in early days, were about property of Land; and, therefore, those who had a permanent Interest in Lands, were best judges of what affected them.

I have laid before you the facts from which you will judge; but I have less scruple to tell you at once my conclusion, without a minute detail of particulars,

particulars, because you are as good a judge of this subject as a Lawyer. My observation is this, that though the nominal qualification has varied from 20s. to 10l. in four hundred years, yet the real value is much the same, considering the different intrinsic value of money, and the different price of corn and other commodities. This it will be easy to compute from the Records of the Mint, and the printed accounts of the price of labour and provisions in those days, compared with both articles in our own. The contrast, let me observe, will be pleasant, when we consider, that the qualification for a Vote, at County Elections, is still the same as it was at first, only 40s. ; it began in Hen. VI. and has continued so ever since. By these means the choice of the Representatives in Counties, is more particularly the full act of the body of Constituents. Whereas, had the qualification of Freehold voters kept pace with the other qualification of Juries, the number of Constituents would have been so reduced, that a City, or even a Borough, might at this day have had nearly as many votes as a County ; which circumstance would still have added to the weight of Boroughs, that already in one view, it has been observed, presses so hard on the general right of Representation in this Constitution. Add too that in some Counties, and those too, where the number of Boroughs are looked upon with rather a jealous eye, the number of Leaseholds of very considerable property, which in their nature are excluded from this suffrage, bear so great a proportion to the Freehold Estates, that the scale is still far from a Balance. This is the evident result of what are called the Western Tenures, from their prevailing principally in those Counties ; in which Leases for long terms of years, determinable upon Lives, seem

seem a very general mode of possessing valuable estates under the owners, often to the exclusion of any Freehold Interest in the Tenant; and consequently, the capacity of constituting their Representative.

§. 51. I am afraid I have but in part answered your question—you will tell me, these are only regulations of Juries, and by Law: your regret seems to flow “from a supposed diminution of this form “of Trial; and *the effect of it overturned*, even “where it continued.”

PHILANDER.

Indeed it did.

EUNOMUS.

By these expressions then, I conceive you mean, that in many proceedings, the Trial by Jury is dismissed; and that in many cases, the opinion of the Court has afterwards leaned against the parties who had recovered on the trial.

PHILANDER.

That is my meaning.

EUNOMUS.

By the diminution you speak of, I suppose you allude to those summary convictions, that, at first view, are levelled very strongly, indeed, against this mode of trial: where, instead of Cross Examinations of disinterested witnesses, the Oath of an Informer joined to another Witness; or the aid of the Parties Confession, got how it can, without
any

any Evidence but that of the Informer, concludes the Trial: and after all, *one man* is set up as a Judge of the weight of this evidence, instead of *the twelve* known to the Constitution.

PHILANDER.

You have placed it in the very light I should have done.

EUNOMUS.

But, my Friend, that is not the true light. You never heard that a Justice of Peace, had a complete final Jurisdiction. He may, like the Constable in the Play, think "he sits to represent the King;" but he in that light, must remember.

Regum timendorum in proprios greges,
Reges in ipsos Imperium est Jovis.

And long as this officer has been intrusted with a necessary share of Power, to lighten and diffuse the weight of Government, and great as the obligations of the Public most certainly are to him who executes this trust with abilities and integrity, the Constitution has, in no instance, made him absolute in a Judicial capacity. His orders are examinable at Sessions; and from thence at Westminster-Hall. His Convictions are removable there: if Illegal, may be quashed, and himself liable to an Action; if Oppressive, in their Circumstances, tho' they should be legal in Form, he may be punished by Information: in the Action, or the Information, his conduct will be reviewed by a Jury; and as they find, the Court will proceed. A Jury then, you see, is only dismissed in the first instance; never discarded. In short, I do not know

know any Judicial Transaction whatever, cognizable in the Temporal Courts of this Kingdom, in which, in the long run, the Facts may not be brought before a Jury. In the superior Courts of Equity, Issues at Law are frequently directed to satisfy the Court, where the Depositions are not Evidence enough: if that kind of Evidence, where material, is suspected, the Witnesses may be indicted for Perjury in the highest Courts of Law. In the Courts of Law, where the return to their Orders are contested, the Facts returned are put in Issue. Material Affidavits, if full, but not true, are likewise indictable. And can you imagine, when in these great instances a Jury is still liable to be called upon, that a petty Constable or a Parish Officer, most ignorant of the Law, and under most temptations to abuse it, should be left a merciless Tyrant within his district? Rather do not you admire the wisdom of the Legislature, to have Justice done, when it can be without delay or expence, by Summary Convictions: where it cannot, to reserve in the end a redress to the Party injured, a punishment to Oppressors, and a check to all in those inferior stations?

§. 52. As to the Powers which Courts have exercised after a Verdict, and very often against it, you will scarce think it a proper subject of complaint, when you have considered it ever so little.

In Common Cases, the effects of a trial have been defeated three ways, by proceedings after it—either upon a motion in arrest of Judgment—to set aside the Verdict—or for a new Trial. In the first, the effect of the Trial is defeated, because there regularly ought to have been no Trial at all; or because it appears from the Record, that no Judgment can be had. Sometimes the very demand itself might have been stopped by Demurrer, without

out ever bringing it to a Trial; but that is where the Demand is bad on the Face of it: often this can not be known till the proof is heard; for then it appears, that though the Jury have found for the Plaintiff, yet that what is found is no cause of Action. In this kind of motion, I take it, the credit and capacity of the Jury are always unimpeached.

The other two motions are levelled more directly against the Verdict itself: the first to set it aside for the Misdemeanor of the Jury, or an irregular finding: the latter for a Verdict contrary to the plain weight of Evidence, or for the misdirection of a Judge.

In both these, whatever further examination there is, must be by another Jury. In the latter, it is awarded in Terms: in the former, it follows, as a consequence at the Parties option: because the Verdict being set aside, there can be no recovery or acquittal; and consequently no bar to another Action.

In all these instances then, *Philander*, your favourite Jury are still adhered to.

PHILANDER.

I was just going to interrupt you, with observing the contrary from your own words. The misdirection of a Judge, that has misled one Jury, is, I agree, a proper ground for sending the matter to be examined by another; but my difficulty is about any direction of a Judge to the Jury at all; let him, if you will, recapitulate the Facts, but not observe upon them. I have sometimes heard, this Province of the Judge has made a cypher of the Jury; nay, has even made them find contrary to their own meaning.

EUNOMUS.

EUNOMUS,

I am glad to find you do not vent this notion as your own: it is what I have heard too; but have as often observed, that it proceeded more from private interest or party zeal, than principles of Law. I know too, that directions have, in some Cases, been carried much too far. Nobody can read the State Trials in particular without owning it. But a particular Case, where the Law has been forgotten, is no argument against the general policy of the Law itself. I will therefore, with great diffidence, lay before you, what, from no inconsiderable researches in our Law-Books, seems to me the policy of the Law, in this respect; what directions, in general, a Judge may or ought to give to a Jury.

§. 53. All that I have said or have to say upon the subject of Juries, is agreeable to this established maxim: "that Juries must answer to questions of Fact, and Judges to questions of Law." This is the fundamental maxim acknowledged by the Constitution. And yet this is the maxim, which those who have advanced Doctrines against the Constitution, have ever in their mouths.

Fundamental maxims of Law or Government, are so plain and intuitive, that every body understands them: the lowest capacity makes them their standard in their own breasts, to judge by. And, therefore, those who would lead a party in a wrong cause with success, must do it, not by disputing fundamentals; but by avowing, and afterwards perverting them. This seems to be the case at present.

It is undoubtedly true, that the *Jury* are Judges, the only Judges of the *Fact*: is it not equally within

within the spirit of the maxim, that *Judges only* have the competent cognisance of the *Law*? Can it be contended that the Jury have, in reality, an adequate knowledge of Law? Or that the Constitution ever designed they should? I will only remind you, that every country Village has its Jurors; whom nobody will suppose to be Lawyers. And it is from the generality, that we are to form our notions of the nature of a Jury, as the Law has prescribed it; not from the abilities of any particular man, or any particular Jury. Well—"but the Law and the Fact are often complicated;" then it is the province of the Judge to distinguish them: to tell the Jury, that supposing such and such Facts were done, what the Law is in such circumstances. This is an unbiassed direction; this keeps the Province of Judge and Jury distinct; the Facts are left altogether to the Jury, and the Law does not controul the Fact, but arises from it. If the Law is thought to be mistaken, the direction of the Judge that gave it, will be considered (as I have said) in another Court; and if it is mistaken, the Verdict in conformity to it, will be of no effect. But I never yet knew a Verdict complained of, as contrary to the direction of Law given: it can scarcely be concluded it is. And the reason is, because the Law arises only from the Fact; and the Jury previously find the Fact in their own mind, before they couple it with the Law pronounced from the Bench, to make up their Verdict. Every Verdict is compounded of Law and Fact; but the Law and the Fact are always distinct in their nature.

But *Littleton*, and his great *Commentator*, have been made advocates on this occasion. They have been thought to say, though at the peril of contradicting themselves an hundred times, that Ju-

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rors are Judges of the Law as well as the Fact.—
 “ If they will take upon them the knowledge of
 “ the Law upon the matter, they may give their
 “ verdict generally, as is put in their charge.”
 But does not the Judge betray his trust, in not
 telling them how the Law is? If he does not tell
 them, it is true, they may suppose it to be so, and
 find accordingly: if he does tell them how the Law
 is, they are to compare the Fact with the Law;
 but can not of their own head say what the Law
 is. The Law is never submitted to them as part of
 their inquiry. No finding, as I have said, can in
 general be complained of, as against a Judge’s di-
 rection, but as against the weight of Evidence:
 and in that case the remedy is well known. The
 warrant of Commitment, as stated in the return
 in *Busbel’s Case*, it is true, was expressly granted
 against the Jury, *for finding contrary to the direction*
of the Judge in a matter of Law. Which part of the
 Return, Ch. J. Vaughan said, literally taken, was
 “ insignificant and not intelligible;” and if it had
 any meaning, stripped of the veil, and colour of
 words, was a direct argument for the abolition of
 the Form of Trial by Jury: because the Judge in
 such case, must resolve both the Law and the
 Fact. True it is, the Chief Justice does there put
 a particular Case of a Jury finding against a Judge’s
 direction, which, in general, for the reason he has
 given, is impossible. And that case is, where a
 Judge asks the Jury, previous to the Verdict, how
 they find such a particular thing propounded to
 them? If, on their giving an answer, the Judge
 adds, Then as you agree to find the Fact so, the
 Law is for the Plaintiff or Defendant: and if the
 finding is afterwards contrary to what he declares;
 they do, in that case, find contrary to the Judge’s
 direction in matter of Law. But then you see in
 that

that case, the regular order of proceeding is directly inverted; the Judge makes them find a particular Fact, previous to his declaration of the Law. Whereas, what Lord Vaughan calls the *discreet* and *lawful assistance* of a Judge to a Jury, is always to give an *hypothetical* direction to the Jury: not by previously having their answer to the Fact, and by thereupon declaring the Law, to controul their Verdict; but to leave their Verdict free, by saying, *if you find the Facts so and so*, then the Law is for the Plaintiff, or you are to find for the Plaintiff, or vice versa.

All this reasoning shews, that the province of Judge and Jury, as to Law and Fact, are separate and exclusive: that in the general and regular form of proceeding, it is impossible for a Verdict to be said to be against a direction in Law; but if the Case should happen, the Verdict must be rectified, for this plain reason, that it appears, in such a Case, the Jury have taken upon them the Determination of the Law, which is entirely out of their Jurisdiction. These observations seem to be a full answer to the contrary doctrine in Sir John Hawle's Book; and other scattered occasional publications.

But *Philander* will excuse me, if I address myself for a few moments to you, *Policrites*, in vindication of a point of so much importance; and which, whenever it has been the public topic, has unfortunately been strangely mistaken, if not wilfully misrepresented.

Besides what I have already said, I think it will undeniably appear, that Juries are designed, by the Constitution, to be Judges of the Fact only, and not of the Law, for these reasons:

First, Because the contrary supposition is against the plain tenor and import of their *Oath*. The
Form

Form of every Oath administered in a Court of Justice, is either according to Common Law ; or as required by some Act of Parliament. An Oath of Office contains a summary description of Duty ; and the Terms of this Oath are so strictly applicable to Fact only, that they do by the strongest implication, exclude any cognisance of Law.

Every Juror in a Cause is enjoined by his Oath “ well and truly to try the Issue joined between the Parties, and a true Verdict to give according to the Evidence.”—Now to consider this by parts,
 1. He is *well and truly to try* : how can any one well and truly try any point, but according to his knowledge? Either according to his own knowledge? Either according to his own previous knowledge ; or according to the Information he meets with at the time of the Examination? A Juror may have knowledge of both kinds as to the Fact ; but can have of neither as to the Law. I have already intimated, the generality of Jurors are not Lawyers ; they, in general, therefore, can have no previous knowledge of the Law that may arise in the matter before them. They are, for the same reason, in most cases, as incapable of making any adequate decision of the Law they may hear during the Trial. The Council on each side, may insist the Law is on his side ; the Jury must be incompetent Judges of which are in the Right, for want of being previously acquainted with the Subject. As some opinion then, in such cases, must be formed ; they must acquiesce in the direction from the Bench. That direction, I have observed, is not conclusive on the Parties : but may be reviewed by the Court where the Record came from ; and afterwards in another Court upon Appeal.

2. The Oath directs the Jury to try *the Issue joined* : this Issue is always a Fact denied on one side, and affirmed on the other. Where the Law is directly
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in dispute, the Issue goes before the Court, and not at all before a Jury. And though during the Trial of an Issue of Fact, points of Law do very often incidentally arise, it does not follow from thence that they are under the cognisance of the Jury, any more than disputes about Practice, the competence of Witnesses, or whether such and such Evidence is admissible, which do as often arise in the course of a Trial; and were never contended to belong to the Jury. The Law, therefore, because it arises out of the Fact, and because in the end it is to govern it, does not, on that account, appertain to the Jury: if from other considerations it appears to be improper.

3. What can be meant by a "*true Verdict*?" Truth, I believe, both Philosophers and Lawyers will refer to Fact, rather than opinion about Law: when it is referred to opinion, we mean the agreement of a Proposition with our own ideas, or the ideas of others. But how those who have (as I mentioned) such faint and imperfect ideas as Jurors have of Law, can discern this agreement, or judge of the Truth in such a Case, I am at a loss to conceive.

4. But to exclude the possibility of a doubt in this question, their Oath does not barely direct them to find the Truth, but tells them what rule or measure they are to go by in their enquiry: they are to find "*a true Verdict according to Evidence*:" this branch of the Oath, which governs the whole, can be applied only to the Fact: the Fact only is in Evidence; and consequently the Law not being in Evidence, is not before them. If the Law was to have been included in their enquiry, the Oath should have run, in more general terms, "to find a Verdict according to Right, or according to Justice;" and not barely according to Evidence.

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Thus in the clearest Terms, does the Oath limit and define their duty.

But, secondly, in the course and management of a Trial, other persons are, likewise, under an Oath, and have duties incumbent on them also. Now without looking into the Oath of a Judge, it will be easily understood to be inconsistent with his duty and his Oath, to be a mere cypher on the Bench. A Judge, however, will be little more than a cypher, either if he sits and says nothing; or if what he does say, is to go for nothing. I have already insisted, the Jury's unacquaintance with Law, makes it necessary for the Judge to tell them what the Law is in the Case before them. He tells it them surely to very little purpose, if they think themselves afterwards at liberty to determine otherwise.

Besides this view of the question, arising directly from the nature of the Oaths and Offices of the Judge and the Jury, there are other collateral arguments, which deserve to have some weight on this occasion, because they seem to flow as necessary consequences of the fundamental maxim I set out with; they are an explanation of every day's practice; and the reason on which that is founded, uncontestably establishes the distinction of the maxim itself.

But because it is extremely difficult to be understood on topics, so strictly technical, by any body but Lawyers; I shall be very concise on this head.

The arguments I allude to, arise from the forms of Pleading, and the general frame of Records. There are none, perhaps, more justly to be relied on, than what arise from an uniform unvaried manner of Pleading.

1. It is well known, in constant Experience, that by the mode of drawing a *Demurrer*, the matter in
debate

debate is referred altogether to the Decision of the Court, and in reality never does go before a Jury. By a Demurrer, the bare Law is in question: the Fact being constantly admitted, if clearly expressed. The reason of admitting the Fact in that case (I take to be) that without such confession of the Fact, the Court have no ground to go upon: for the Law, in every case, arises from the Fact. Even in speculation the very supposition of a thing being done, is antecedent to the Enquiries concerning the Legality of doing it. And, to use Lord Holt's expression, a Court will not sit to determine Coffee-House Wagers: or as Lord Bacon emphatically says, "nil habeat forum ex scena." The Case then must really exist, before the Legality of it, as to circumstances, will be determined. But if a matter, where the Law only is in question, is never sent at all to a Jury; it proves, almost to Demonstration, that the Jury have nothing to do with bare Law.

2. Nor is the argument to be drawn from the nature of a *special Verdict* of less force on this occasion. The *ignorance* of the Jury as to the Law in the Case, and their reference to the Court, is the constant Language of a *special Verdict*. Not that the Jury can in reality be supposed more ignorant of the Law arising in such a Case, than they are in a thousand others, where all is concluded under a general verdict: indeed, in that light, at this time of day, the Common Juries are amazingly improved in their knowledge of the Law; there being very few instances of their expressing their doubts in *special Verdicts* at this day. The reason of having *special Verdicts* at all times, was in order to have the point of Law solemnly determined, and remain on Record; without which, in many Cases, no Writ of Error could have been

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brought in former times, nor the point reserved for the consideration of the Court. The usage of *stating a Case*, and having a general Verdict subject to the opinion of the Court afterwards, on the circumstances of the Case, is an invention of late times; and is found, in Practice, to be less expensive, and answer to the Parties as well as a special Verdict. And, indeed, from this mode of proceeding, the Court have the same satisfaction, though, by the Record not being particular, Posterity have not. But both the Case stated, and a special Verdict, are proofs of what I am contending, by expressly leaving the Law to the Court: and yet are not exceptions to all other Cases (as some have insinuated) in this respect, as if the Jury desired to be informed of the Law in these cases only, and took it upon themselves in all other cases; because every body must allow, the Jury, in reality, are at least as ignorant of Law, in other cases, as in that of special Verdicts, where alone they confess their ignorance.

I shall only add to this very prolix refutation of the notion I have opposed; that it has been made use of chiefly in the Case of Libels, and, perhaps, would never have been contended for as a general doctrine, if it was not to serve particular purposes. Most writers, it is true, have cautiously disclaimed being advocates for a Party; though the very date of their Observations, and manner of conducting them, have too often discredited their assertion. Indeed, without the imputation of designed partiality, the best men are too apt to be warmed with recent events. The only time for a calm dispassionate inquiry in such points, is when the event is at a distance, and the voice of Faction is silent.

The professed Patrons of the notion I have argued against, have (I say) principally applied their doctrine

trine to the Case of Libels : but were aware, that the conclusion would be general, though the Case was particular ; because the Right of Juries to determine the Law in the Case of Libels, could only be a consequence of their right to find the Law in other Cases. There seems to be this fatality, that has, in Practice, attended the Case of Libels, that the Law and the Fact do not seem to have been always accurately distinguished : and, perhaps, in feverish times, some particulars have been contended for as implications of Law, which ought rather to have been considered as Facts, and left to the Jury.

To me it seems, universally, that any action, the intention of the agents, and every other circumstance under which that action was done, are equally facts, and as such cognisable by a Jury : but whether that action under all the circumstances in which it has been admitted or proved to have been done, is a crime or not, is what the Law alone can determine, and those whose breasts are the depositaries of the Law, alone can pronounce ; otherwise it is evident the quality of human actions ; more especially of those, that are in themselves indifferant, and have been defined by Society alone, would be referred not only to a very variable standard but an incompetent one. Apply this particularly to the Case of Libels, and the least reflection will be sufficient to shew, that the power and province of Juries is the same in Case of Libels, as in every other Case. And that in no Case whatever, a Jury has, in its nature, a cognisance of Law, though by accident the Law may have been sometimes left to them.

Much, I fear, has your attention been abused in my attempts to settle a point that has, at times, laboured under the most flagrant perversion, heightened

tened by all the fallacy and false colouring that Faction is too apt to bestow on favourite objects of speculation. It only remains, to take up the conclusion, which I hope you have long before formed, that the Trial by Jury is as much respected as it used to be, and much more improved.

And, however a Jury is seemingly dismissed, by Act of Parliament, as to some Misdemeanors, I know no Case, "Concerning Life or Limb," which is not subject to the Examination of a Jury, and oftener, before the Trial is completed, to two Juries, than one.

§. 54. Indeed, the *Criminal Law* of this Country, is one of those points of eminence in the Constitution, that taking your view from thence, you may command the most extensive prospect of Liberty, and look down (as I may say) on all other Governments far below it. I think this will be evident, if I remind you ever so little of the nature of Crimes and their Punishments; of the manner of charging and convicting Criminals.

The Laws of England, in relation to *Crimes*, differ very much from those of other States; and are excellently fitted to the convenience of the English Government. I do not suppose any Country has such fixed and precise ideas of Crimes. Of which the various and well defined shades of Guilt in Treason, Homicide and Thefts are very remarkable instances. This precision is the more necessary, because the Punishment is, (as I hinted) in all cases of Crimes, as fixed as the Crimes themselves.

The complexion of our Penal Laws is no more Severe than it is Arbitrary. All *Torture* is disclaimed even as a Punishment, much less used as the means of Conviction, as it was by the Roman Law, and still is in many other Countries.

PHILANDER.

PHILANDER.

§. 55. Our own, indeed, in this respect, has greatly the advantage over most other Countries ; but, I cannot help thinking, in one respect, other Countries hold out an example worthy to be followed even by us. As on the one side, the Law of England disclaims the use of *Torture* ; on the other hand, I think, it makes too free with *Death*. Several States in Europe, apply hard Labour instead of Death, as a Punishment for all kinds of Theft ; many of which, in England, are punished with the loss of Life.

If, in this case, I go as far as *Sweden* in quest of examples, and continue my examples to the Southern bounds of Europe, it is to shew you the extent of the practice. But it is scarce worth while to be particular, 'till we come to States nearer home ; and which fall more within the reach of observation. Am I, in this view, to remind you of the salutary and extensive regulations the Police of *France* has invented for the management of their Galley Slaves ? In *Venice*, where they receive with their own, the Criminals from the Emperor's and the Neapolitan dominions, one may see twenty gallies full of slaves at the same time from St. Mark's Place. Even in the little State of *Berne*, it is common to see their *Schalvers*, or criminals, condemned for theft, brought out in chains to clean the public Streets. These latter instances, I have drawn from States whose very basis is Freedom ; and which therefore may be allowed to add something to the scale on this side the question. But whatever becomes of the question in this view, let us for a moment consider the excessive freedom of capital Punishments. The late Empress of Russia, perhaps

perhaps by an excessive strain of humanity, abolished capital Punishments in all Cases whatever. The natives of America, on the other hand, we are told, punish every thing with Death. We go too far: and (though want of Compassion is a Character our enemies would hardly fix upon us) are guilty of a kind of stoical absurdity, in making Crimes of the most different malignity, equal, by inflicting the same Punishment. With us, Murder and Theft are punished in the same manner. With us, if a man takes three halfpence from the person of another on the Highway, the Law says, he shall be hanged: if he takes a thousand pounds in the same circumstances, what does the Law say more? I am not urging, that the Law in any Case ought to go farther, by accompanying Death with Torture: but that it ought in many Cases to stop short of its present course; and to make Death more terrible when it comes, let it seldomer be seen.

E U N O M U S.

Death, you will allow, must here, as in all Governments, be admitted in the last resort, in many Cases. And those, who wish to reduce the number of these Cases, and, in some of them, to exchange Death for Slavery, have, I fear, been misled by a compassion, founded, in some measure, on the ignorance of their own Constitution, and a bad imitation of other Governments. They undoubtedly forget that amiable Power of the Crown, whereby *Mercy seasons Justice**, a Power that can at any time, and so often *does* arrest the arm of Death; though the Law has raised it ready to give the stroke.

* Shakespear's Merch. of Venice.

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PHILANDER.

You mistake me, *Eunomus*, if you think I urge an exchange of Death for Labour, on the mere principle of compassion to the Individual : I do it in a much more extended view ; as a point of the utmost concern to the Community. It is in this light, I remember, several of our greatest Politicians have considered it. In saying which, I would be understood more particularly to allude, not so much to the fanciful accounts of *Utopia*, as to what has been more professedly and seriously advanced by *Sir Will. Temple*, and the celebrated *Bishop of Cloyne*. In the beginning of our conversation, we allowed them both an authority as Travellers : and though they may have borrowed this hint from other Governments, I am sure they are writers of that literary and political rank, that you will not impute any thing they may happen to apply from other Constitutions, to an ignorance of their own. In the shortest view of the question, what can sound Policy, as well as Humanity, say in the present case, contrary to what *Horace** has said on an occasion nearly similar ?

Vendere cum possis captivum, occidere noli :
 Serviet utiliter. Sine, pascat durus, aretque,
 Naviget, ac mediis hyemet mercator in undis.

You will tell me, perhaps, that *our State* has neither the Mines of Sweden, nor the Gallies of France, for the employment of its Criminals. But it has employments that will answer the same purpose to the Criminal, and a better to the Public : where they may be more useful in their work, and more seen while at it. The writers I mentioned, will remind you of *Repairing Roads, making Rivers navigable, draining Bogs, working in Docks, and in Forti-*

* Lib. i. ep. 16.

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fications. And, in my opinion, a *Querist* condescends to doubt whether the Sun shines at noon, when he asks, “*whether we might not as well make a Criminal useful in Public Works here, as send him either to America or the other World?*” The many Cases under our present System, in which hard Labour is the express Punishment for a limited time, are sufficient to recommend an extension of it for Life, as a Punishment for greater Crimes; with this only difference, that the World should be the scene of Penal Justice in the latter Case, not a private house of Correction as in the former. Upon the whole, I conclude, a regulation of this kind, well considered, will make every end of Punishment meet, which it is impossible to do by any other; it is more likely to *reform* the Criminal himself; to *make Satisfaction* to the State, or the Party injured; and to be an *Example* of Terror and Consequence to the Public.

E U N O M U S,

I am not apprehensive of giving your argument more weight than I could wish it, when I observe to you, that some who have been for moderating capital Punishment, have found out other applications of a Criminal for the Public service, than that of Labour. A celebrated French Philosopher was of opinion, that Criminals who, according to the present prevailing notions, have forfeited their lives to the Community, might be made use of for new experiments to promote natural knowledge: so that they might, with a chance of life, be made the Instruments of Science, instead of the Victims of the Law, by a certain and infamous Death on a public Scaffold. Something of the kind has been practised in England. The first trial of Inoculation
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for the Small-Pox, was made on a capital Convict, at the request of some eminent Physicians at that time. Any thing of this kind in England must, as the Law now stands, be done by the King's Prerogative; by the remission in a particular case of a Sentence, which the Law passes in all Cases of the like nature. But the question now is, whether this Sentence of the Law is in itself severe; or if it was more favourable to the Criminal, whether it would be more useful to the Public?

Had your argument been built merely on Compassion, it would have wanted no apology; for if Compassion, in a large view, is a weakness, it is such an one, however, as nobody need be ashamed of: it is the frailty of a man pleading for human Nature! Lord *Coke* himself closes his history of Crimes and their Punishments, with very tenderly lamenting, that so many suffer capitally every year. But there is not a single insinuation throughout his book, that the Law is at all too severe, or makes more Cases capital than should be so. Two reasons strike me, why the Law, in the Cases you alluded to, should stand as it is.

1. Because the Law, as it stands, does, in my opinion, best answer the noblest purpose of Criminal Law, that of *preventing* a Crime, rather than *punishing* the person who commits it. In maintaining this assertion, I must more particularly insist on what I just now hinted, that I consider the power of *punishing*, and the power of *pardoning* taken together, as parts of the same System. The Law is fixed as to the Punishment of the Crime: but a discretion is left in the King, as the executive power, to moderate the Punishment according to the circumstances of its commission. Its being fixed, best answers the freedom of the Government. Its being capital, best answers the purpose of Terror,

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by example to others, when it is necessary to inflict it; and so by punishing the crime with severity in one instance, it is to be hoped, the commission of it in a great many may be prevented. And yet the power of moderating by occasionally relaxing the severity of a capital Punishment, does, in point of Fact, take off your imputation of a stoical absurdity in making Crimes of a different malignity equal, by inflicting Death alike for all. But here, my friend, you have unawares dealt in *Utopia* goods, which before, in point of serious argument, you had allowed to be contraband. *Sir Tho. More*, it must be owned, has indulged many a conceit in his Book, which he would never have uttered from the Bench. And though he has said much on the severity of this Punishment, I think all that he has said is answered by this power of the Prerogative, in checking that of the Criminal Law: and that the Law, therefore, does not deserve to be arraigned for its rigour, because it may at any time be mitigated by the power of Pardoning, that is so valuable a part of it.

2. But even independent of this consideration, I think the Law is much better as it stands, than to have it altered on the grounds that have been proposed. Because the Law can not well be altered on those Terms but against the direct spirit of the Constitution. As to your instances that obtain in free Governments; I have only this answer, that, considered in themselves only, such instances are in reality an exception to the boasted freedom of those very Governments: and are dictated by a spirit of Tyranny, in opposition to that Liberty, which ought to be (as you insinuated) the basis of such Governments. As to *Venice* in particular, the Gallies seen from St. Mark's place, would in my eyes be a spot that deforms one of the brightest Scenes

Scenes in the World! and the same argument, the freedom of that Republic, might be brought to recommend their State Inquisition and the Rack, in their manner of charging and convicting Criminals, full as well as their slavery imposed in punishing them. I would not have *Slavery* introduced into this Country, even as a Punishment. If Labour is only another word for Slavery, I see little difference, in point of mitigation, between Labour and Death: they may well be placed together, as they are by *Virgil* in his description of the Infernal Regions: they are both *alike dreadful* in their mien, *alike distant from Elysium*:

Terribiles visu Formæ ! Lethumque Laborque.

That the hard *Labour* your Politicians recommend, must be *Slavery* here, and that it is so wherever it is used, I need take no great pains to prove. The quotation from *Horace*, is not so much on your side, when you reflect a Criminal must be treated differently from a Captive. And not one of the writers mentioned, affect even to disguise the term of Slave. *Sir Tho. More*, to give the example of antient Rome the greater weight on this occasion, calls it, the Mistress of Political Wisdom, and then tells you the Criminals there, were condemned ad metalla, "*perpetuis adservandos vinculis.*" But even in our own times it has been asked, by your favourite *Lucrasi*, whether "*the view of Criminals chained in pairs, would not be very edifying to the multitude?*" What? to see several hundred people in England, working on the Roads or in the Fields, or employed about public Buildings, *chained*, and obliged to submit to the wanton severity of their masters; to make the whole Country, which ought to be as free as the air that surrounds it, as
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it were one universal Gaol or Dungeon; and to have no other voice in our Streets than that of oppression and misery: the very supposition is shocking! Besides, without pursuing remote consequences, if this punishment operated by way of example to the Public, it must operate from a principle of *Fear*; not from motives of *Terror* arising from the severity of the punishment, but of an abject Fear, that is in its own nature the very reverse of that principle on which this Constitution is founded: and which, I doubt not, would in the end go a great way to destroy it. Not to mention, after so weighty a consideration, that this expedient would be as unnecessary for the public, as it would be dangerous and impolitic. There will be always hands enough to work on proper encouragement: only enable them to live by their industry, and treat them as men and fellow-subjects, Englishmen will not be wanting for every useful public employment; and freedom and industry surely have more music to an English ear, than hard labour and chains. This way of thinking satisfies me: and I am happy in observing, that after all that has been said in favour of this scheme, it has been offered to the Legislature, and nobly rejected.

Our debate has, as usual, carried us out of the direct road: before this point was started, I was going to remark, that in early ages our Ancestors, like most other nations, in a rude state of policy, fell into the two modes of *Punishment*, that Barbarism alone could invent or adopt. The first, that of punishing the *peccant Member*, as it was called. In Slander and Perjury, for instance, the tongue was cut out. A Cut-Purse lost his right thumb: and this, perhaps, first introduced burning the hand (rather than any other part) in the case of Clergible

Clergiable offences. So in House-Burning, the Felon was burnt: and for striking in Westminster-Hall, sitting the Courts, the right hand was cut off.

They likewise fell into the other mode, of accepting a *Fine* in lieu of exacting corporal Punishment on the Offender. This notion was dictated not so much from an undue sense of the malignity of Crimes, as partly from religious scruples; our Saxon Ancestors thinking that, under the Christian Institution, no person ought to die for any Offence. But it might have been partly also dictated by the necessity of the times, which, in the infancy of Society, made them value life too much to shed the blood of any man, even in satisfaction for that of another he had killed. But the first dawn of political reason, disperses these clouds, that can obscure only the most dark uncivilized ages. And though our Ancestors soon came to put a different estimate upon the life of a Man and that of an Ox; yet in no time can the Law be accused of Cruelty; or be said, as Draco's were, "*to have been written in blood.*"

§. 57. If this is the case in settling the Punishment of Crimes; how much more engaging is the humanity and tenderness of the Law in its manner of Charging and Convicting a Criminal?

The *Charge* may be said to commence with the warrant of Commitment. The word itself is the common, though not the necessary language of the Warrant, any more than the information upon Oath, on which it is granted. The Magistrate is not obliged to express either in his Warrant; but if under colour of this omission, he acts without them, he will himself be liable to answer in a criminal way, if the party is afterwards acquitted. I shall be well understood by *Policrites*, when I add, that

that one of our Crown writers, *Hawkins*, says, (and a very great living authority has confirmed him in saying) it is safer to insert “ the information on Oath in the Warrant, though it is not “ absolutely necessary.”

The *Commitment* itself is a necessary indispensable step in few Cases only. And the Habeas Corpus Act, in that respect recognising and strengthening the Common Law; makes it necessary to justify the Detainer, that the Treason or Felony should be plainly and specially expressed in the Warrant. Every other Case (not excepted by express provision of Law) is bailable; and if the Magistrate refuses Bail, or exacts illegal Bail, he is punishable for his Oppression; and the Prisoner, upon giving reasonable security, will be discharged out of Custody. The reason why the Law refuses Bail in certain cases, seems to be, that these being capital cases, no Property, which is the utmost the Bail can forfeit, shall be deemed an equivalent to the State for the life of man, which the Law has fixed as the Punishment for these offences. It was for the same reason, in our antient Law, that when a Criminal fled from Justice, his Outlawry amounting to an Attainder, he was said to be proscribed like a Wolf, or considered as dead, and any one might really kill him. At this day, that rigour is abolished; and upon appearance, the Outlawry itself, though it still is an Attainder, is very easily reversed in preference to a fair and candid Trial of the Fact.

And I am sure you will think it a very fair *Trial*, when I proceed to inform you, with what caution the accusation itself is made; and with what exactness, it is afterwards proved.

§. 53. Every criminal Case is, in the end, subjected to the Examination of two Juries, except that

that of a Parliamentary Impeachment; and, in some cases, to three Juries: and this only to the completion of a single Trial. An *Impeachment*, which in name only is not a Trial by Jury, is, in reality, that, and a great deal more: for the Accusation is made in so many distinct articles by the *House of Commons*, the *grand Inquest* of the Nation; and that Accusation is heard in the most unexceptionable manner by the *whole body of Peers*. The Majority of whom must find the Prisoner guilty, and will, in most cases, exceed ten times the number of a common Jury.

The single Crime "of the Death of Man," is subjected to three, I may say, four Juries: that of the Coroner, the Grand Jury, and the Petit Jury on the Trial; to which, in very particular circumstances, may be added the Trial on "an Appeal." The Crime itself will well justify this extraordinary caution; the loss of a subject to the King on one hand, and the severity of the Law to the Criminal on the other: for this is the only Crime which must be pardoned by express name; and which has very rarely met with the mercy of the Crown.

The *Accusation*, in most Criminal Cases, is by the *Grand Jury*, consisting of at least twelve persons of rank and property, in the County where the Fact arose: and it is made upon substantial presumptive Evidence. You know very well, that Accusation found by them and drawn into Form, is called an *Indictment*. The Etymology of the Term, very well expresses the precision of its Form. It must describe the nature of the Crime itself, and the circumstances of its Commission, by the Person accused, with that certainty, that if the Facts as laid in it are proved, and apply to the Crime rightly
alleged,

alleged, it must be a "demonstration," that the person accused is Guilty.

The manner of *proving it*, I am next to consider. And it is in a few words by living Witnesses, examined before the Prisoner in open Court, and cross-examined on his behalf; and the weight of their evidence is left to the unanimous Judgment of twelve men.

The Law of England, in one respect, differs from all Countries in the world; it desires *no Confession* from the Accused; and nothing but the force of conscience can oblige him to it: for the Law takes the proof upon itself, desiring only of the Prisoner, that he would say whether *he is or is not guilty*.

In Criminal cases (Treason excepted) the Law allows no Council to the Prisoner; except only in points of Law. This denial of the Law has been censured in the first case: and others, who seem to pay the Profession no great compliment, have blamed the admission on the other. Whether our Law in the denial of Council copied in part the Civil Law, where it likewise obtained, is not easy to say. It is much easier to vindicate it in our own, than in the Civil Law Form of Trial. Our Law supposed the proof would be so plain when left to the Jury, and that the Judge, before it reached them, would so attend to the Examination, as to be, in some measure, (as the books call him) *Council* for the Prisoner. But every body knows, usage has long ago abated this rigour, if it is any.

As to those who take up the other objection, and are against any Council at all in Criminal matters; who, because Council on one side appear in support of the Prosecution, and on the other in support of the Criminal; and because the same Council

cil might before hand, as applied to, have been indifferently on either side, do therefore represent him as indifferent in himself, to guilt or innocence; and ready to turn one into the other, as he is employed: this humourous and candid way of thinking, though it is not uncommon, is seemingly not quite so just.

Although in all, but the cases mentioned, the Law allows Council; yet in no case, Civil or Criminal, does it compel him to have any. A Council, in any case whatever, never defends the Crime itself; it is his business only to see the person accused is not wrongfully convicted: and in that respect, he can only do what the Party himself, if he was able, and master of himself in such circumstances, might do; manage his own Evidence, and watch that produced against him. A circumstance the celebrated Lord *Shaftesbury* once so finely turned to his purpose, must often happen to a Prisoner at his Trial. Attempting to speak on the Bill for granting Council to Prisoners in cases of High Treason, he was confounded, and for some time could not proceed; but recovering himself, he said "What now happened to him would serve to fortify the arguments for the Bill. If He, innocent and pleading for others, was daunted at the augustness of such an assembly, what must a man be, who should plead before them for his life?"

In no Criminal case, except High Treason, does the Law absolutely require more than one Witness; but the Evidence of one Witness, unaccompanied with circumstances, or the Prisoner's free, unbiassed Confession, must be very unexceptionable indeed, to have any weight with a Jury.

§. 59. This Form of Trial, by Jury, valuable in Cases of Property, is peculiarly so in Cases of Life and Liberty. It is founded, in general, on

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Parity

Parity of circumstances and condition. As if those in the same condition of Fortune were most conversant with each others affairs, and most likely to do each other Justice. Thus the temporal Lords, who are all Peers among themselves, with respect to their Parliamentary capacity, though different in dignity, are to sit in Judgment on a Lord indicted or impeached. Thus, in antient times, a Knight was to be tried by Knights: for though a Knight was only a Commoner, yet as he had a stated Property to qualify his Dignity, it was looked upon as more agreeable to the principles of the Constitution, to have his Triers of the same Property. This distinction came in with the Feudal Policy, and as that wore off, was abolished. Commoners, for the same reason, form the proper Juries on the trial of Commoners. It was partly from this principle of Parity, that *Party-Juries* were introduced; which obtain in the trial of a Foreigner, in a Jure Patronatus, and by a Stat. of Hen. VI. in a prosecution for embezzling Records.

It is by speaking of this *Parity* which is of the very essence of this Form of Trial, that the Form itself is mentioned in one of the noblest clauses in Magna Charta. And I cannot help expressing my surprize at Lord *Coke's* Comment on that clause. The Statute says, no Free-Man shall be tried in a Civil or Criminal case, *nisi per legale Judicium parium suorum, vel per legem terræ*. Lord *Coke* begins by reckoning up the "branches of Law that, he "says, spring out of this root;" and adds, dryly, "that no man shall be condemned at the King's "suit, but by Judgment of his Peers, that is, his "equals, or according to the Law of the Land." So far very well: but he comes to a particular comment on the words—*his Peers*—he runs away with the sound of the word, and speaks only of the

the *Trial of a Peer*, in the most confined sense of the word: which, though it is now used merely in speaking of the Nobility, was not known in that sense, till ages after the Statute. It could not be the sense of the Statute; because *every Freeman* is there spoken of, as to be tried by his *Peers*. And surely the idea of English Freedom was not so very confined, even long before that Statute; much less so, at the time of passing it. I take it to be extremely clear to mean the same thing, as the Statute of Treasons has expressed in other words, *gens de leur condition*.

To finish this short sketch of our Criminal Law; when a Prisoner, upon clear Evidence, is convicted of the Crime, of which he was accused, his *Trial* is closed with the settled *Judgment* of the Law. But if, after all, there are any circumstances in his Case that speak for Mercy, the Judge before whom he was tried, may respite his Execution, in order that the King may *pardon* him. The King by his Coronation oath engages to *execute Law and Justice in Mercy*; and that glorious attribute of Majesty, which I have already considered as the proper constitutional balance to the severity of our Criminal Law, will not be in these times (if it ever was) justly complained of as lying dormant and inactive.

§. 60. I am afraid, in endeavouring to satisfy you on this topic, I have borrowed some of the time, that I should have employed in others. I am next, in order, to answer your other questions, *as to the clashing of seemingly opposite Jurisdictions*: and the best way, I conceive, to treat clearly, and at the same time concisely, on so intricate a subject, as that of different and seemingly interfering Jurisdictions, will be to premise a few plain positions, to which all that I shall say may be re-

duced. And they are these three: 1. That as every legal right has a remedy to be met with in some Court or other; so there is, in every case, one Court better calculated to give a remedy than any other. 2. That no person can sue in two different Courts for the same specific remedy. 3. That where different Courts have concurrent Jurisdiction on the same transaction; it is with a very different view, and for different purposes. 1. If the Jurisdiction is *simultaneous*, the end of the Proceedings is different. 2. If the Jurisdiction of different Courts on the same transaction is *successive* (as on Error or Appeal) the Proceedings in the higher Court do, in their nature, supersede those in the lower.

1. In support of the first position I shall endeavour to shew you, that of the four great Courts, each has something particular, though not altogether exclusive in its Jurisdiction.

Borough Courts, Ecclesiastical Courts, and others of confined or local Jurisdiction, either with respect to the person or the object, shew that there must be a certain coincidence of qualities in the suitor and the nature of the suit, to give any Jurisdiction at all: and, therefore, these are easily reconciled to the position laid down; being, in most cases, not merely the best, but the only mode of obtaining relief in particular cases. Therefore, I will not detain you at present with these, but apply what I have to say to the Courts of general Jurisdiction, I mean the *four great Courts at Westminster*.

We are to look for the Commencement of these Courts at the dissolution of the *Aula Regis*: for that Court, like Nebuchadnezzar's image, the origin of the four empires, was crumbled, at length, into the several Courts of Chancery, King's Bench, Common Pleas, and Exchequer.

Their

Their Creation was probably not coæval; tho' as their respective dates can be discovered by no Evidence of Law or History, it is not allowed in the eye of the Law to say, which of them is the most antient. Nor, indeed, are any probable arguments, on this point, to be drawn from collateral matters.

Each of these Courts, at first, had probably distinct and exclusive Jurisdiction. It is unreasonable to suppose that four Courts, at all near each other, as to the time of their origin, should have any similarity in their original plan of Jurisdiction. Nay, their present strength itself is attended with some circumstances that point out their original weakness; I mean those *fictional suggestions* that colour over their process.

The Court of *King's Bench*, the sovereign Court of original Jurisdiction in criminal cases, seems to have been at first intended to have cognisance only in Pleas of the Crown; excepting those cases, where the officers of the Court were privileged by reason of their attendance, to sue or be sued there in pleas of trespass or debt. Or where persons were already under the custody of that Court; and were to be charged with another suit.

From hence arises the Fiction, that (in order to warrant the Proceeding of this Court in Civil Suits) supposes every really unprivileged person, which at this day is almost every Suitor, to be already in the Custody of the Marshal of this Court; and he is declared against accordingly.

The Court of *Exchequer* was at first only a Court of Revenue; and no person was either to sue or be sued there, unless he claimed debts under the King, or was debtor to him. Chief Justice *Treby*, in a very solemn argument, not a century ago, observed, "It was for the sake of the Revenue,
" that

“ that the Court of the-Exchequer had any thing
 “ else to do.” In Ed. III. time, a Writ of Nisi-
 prius was allowed to be granted before the Chief
 Baron of the Court, *if* (as the Statute says) *he was*
a man of the Law; which shews he was not so of
 course. Indeed, whence came the Judges of this
 Court, so contrary to all analogy, to be distin-
 guished by the name of *Barons*, but because the
 great officers, who assisted in this Court, were some
 of them, at least, originally invested with an au-
 thority far different in its nature, from that of the
 barely Judicial Character? And though, as a Court
 of Equity, it has long been open to all Suitors, it
 still nominally preserves the features of its original
 Institution; by representing its Suitors, as Farmers
 of the King, and suggesting that the detention of
 the thing in demand, “ makes them less able” to
 satisfy the King’s debts.

The *Common Pleas*, which, from its being fixed
 in one place, from its Practisers being persons of
 great experience, and called by the King’s Writs,
 was early at least, if not originally, designed to
 have the general cognizance of Civil Injuries, or
 suits between man and man: and though a com-
 munication of Civil Jurisdiction has been formed
 with other Courts, it has gained nothing to ba-
 lance its loss. It is still the only Court for real ac-
 tions: but real actions are seldom brought. It still,
 as it began, is confined to Civil, without the least
 participation of Criminal Jurisdiction; except what
 every Court must have in the power of vindicat-
 ing itself from any contempt of Suitors, or of cor-
 recting itself from any contempt of Suitors, or of
 correcting the misdemeanors of its own officers.

The Court of *Chancery*, considered as a Court
 of Law, was to hold Pleas only where the King
 was properly a party, or where the Plea touched
 the

the Office of Chancery. But its sovereign Jurisdiction is a Court of Equity. Its being no Court of Record, its binding the Person only, and not the Land, by its Decrees; its practice of transmitting Records to be tried in Courts of Law; are all so many symptoms of its former original imbecility.

The term *Chancery*, is not peculiar to this Court; it is applied at this day, to other Jurisdictions. Thus an Appeal is said, in many Cases, to lay before the King in Chancery; not in the Court of Chancery, or a Court of Equity, but before delegates commissioned by the King, and appointed under the Great Seal for that particular purpose. Every Bishop, and every Cathedral, has likewise its Chancellor. Nor is the term *Chancery* confined to this Kingdom any more than one Court in it. Every Kingdom in Europe hath its *Chancellor*: and though the Etymology of the Term is not agreed, yet the nature of the office (as a Civil office) is, in part, the same in all. It is commonly applied to the first officer of Law and State, and seems to take its name from a power vested peculiarly in him, delegated by the Crown, of "Rescinding" particular Acts.

And thus the Term *Chancery*, though in a large sense very different from what we mean by it applied to one Court, yet, even in the largest sense, denotes the original Jurisdiction of the Court of Chancery, as a Court of Equity; viz. "the power of moderating the Summum Jus."

For (though I beg to be understood, as speaking on this subject, too great for any private person, with the utmost diffidence) the progress of Equitable Jurisdiction seems to have been in this manner. It appears, at least as far back as King *Edgar*, that the Kings of England exercised a power of moderating

moderating the Summum Jus, arising from the rigour of the Law. In Ed. I. time and afterwards, this power was exercised on express Petition to the King, and the Chancellor usually assisted the King. — Sometimes, in the absence of the King, (very common for many successive Reigns, during their possessions of Dutchies and Fiefs in France, and the Crusades in Palestine) these Petitions were referred to the Chancellor alone: till at length a Jurisdiction was regularly delegated to him. The *Bill*, it may be observed, still retains the form and language of a *Petition*.

The first Decree made by a Chancellor, is said to have been in 1394, 17 Rich. II. but no settled Jurisdiction was formed, till in the reign of Hen. IV. about 1399. But in those days sprung Feoffments to Uses, as necessary fruits of the troubles and suspicions of the times, whereby the Possession of the Estate was distinct, and divided from the Property; then it was that the Jurisdiction of this Court so greatly increased. And matters of Conscience still stand on that ground. The common division of *Fraud*, *Accident*, and *Trust*, will give a good general idea of the Jurisdiction, and excellent Institution of this Court: being in cases that involve such circumstances, as have, or ought to have, a strong operation on the conscience and intention of the Parties in Transactions; and sit to be here considered and enforced: as Courts of Law have, in general, too weak and incompetent a cognizance of them, being tied up by strict legal ideas and rules of Evidence, which will sometimes fall wide of complete Justice. Not but that Courts of Law do, in many cases, consider the intention of Parties; as in the general exposition of Wills, in all cases of Contracts, and throughout in the large field of Practice, where Courts of Law are invested with

with a discretion that amounts to the most liberal Equity. And in those cases, the Rules of Law and of Equity, are in a great measure the same: perhaps I may add, that there is but this single rule in both, to do complete Justice according to good Faith and the solid Intention of the Parties, in their mutual Transactions. But the general ground of going into Equity, (as distinguished from Law) is *the want of Remedy at Law*; as you learn from the Form of every Suitor's Bill.

I have, therefore, in this hasty account of the Sovereign Courts of *Westminster Hall*, I hope, in the mean, proved the first position I set out with, that in every case one Court is better calculated to give a remedy than another: by which, however, I do not mean, that one Court of Law, or one Court of Equity, is in any respect preferable to another of the same kind; but that the nature of the Case, will point out, whether the Remedy is more proper at Law or in Equity.

§. 61. And I am now led to the second position, that no person can sue, or (as I would put it in the most extensive light) no person can be sued in two different Courts for the same thing. A Recovery in one Action at Law, will be for ever a Bar to a Recovery in another, brought for the same specific cause, in the same or another Court. Nobody, at the same time, shall proceed on the same grounds, both at Law and in Equity: the Proceedings at Law shall be enjoined, or the Bill in Equity shall be dismissed. If the Law of England is thus careful of carrying a Civil satisfaction too far, much more is it, in Criminal cases, where Life or Liberty are concerned. I do not know any maxim more inviolably observed than this, *that nobody is to be twice punished for the same offence*. Here the position is much stronger enforced than in case of Civil Actions.

ons. There you shall not *recover* a Judgment twice for the same cause of Action: here you shall not so much as *charge* a person again, after one Trial had. An Acquittal on an Indictment, is as much a Bar to another Indictment for the same Crime, as a Conviction. And new Trials, which may bring a Civil transaction in review again, and subject the Party to pay Damages in the second instance, which he had escaped in the first; or where a second Jury may assess double the satisfaction given by the first; these, I say, are unheard of in Criminal proceedings: a Prisoner who has once had a *Verdict* passed on him, can never have a second for the same Offence.

§. 62. I was aware, however, that to common apprehensions, some instances of daily practice might be set up, as exceptions, at least, to the generality of what I have advanced, if not objections to overturn it; I did, therefore, by the third position, guard it upon my entrance on this subject; by observing, that where two Courts did entertain Jurisdiction at the same time, or successively on the same transaction, it was with a very different view, and for very different purposes.

The instances of the first kind may be put into two lights: 1. Where the Proceedings are in the same Cause in two Courts at the same time. Or, 2. Where the Proceedings are in different Courts at the same time, but of a very different nature.

The first is where one Court retains the principal Jurisdiction of the Cause, but wants the assistance of another, for a particular purpose: as, where in a Cause in Chancery, a question of Law is sent to the Judges, or an Issue of Fact to a Jury; or a Bill is filed in a Court of Equity for a Discovery, in order to bring an Action at Law.

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The second kind are more numerous and more apparently in the teeth of my Doctrine; the proceedings being in different Courts, at the same instant against the same Person, and arising from one single transaction. As, where any one is sued in the Ecclesiastical Court and at Common Law; for the same cause; or in an Action, and at the same time prosecuted by Indictment or Information.

Now these cases, well considered, are far from exceptions to the position laid down, because they are with a different design. In the first case, the Suit is *pro salute animæ*, in the Ecclesiastical Court; and at Common Law, for a *Civil Satisfaction or Fine* to the King; which surely are different ends of Proceeding. In the other case, a Civil satisfaction is as widely different from a Punishment. But the Offence itself, in both these cases, is in reality double; an offence against the Community, as well as an Individual; public Decency or public Peace being violated, at the same time a private Injury is committed. If then there are two Offences committed at the same time, Why should either go unpunished?

The objection then is groundless in itself, but it never obtained, in fact, so little as at present. A Penal Action and a Common Law Informations will not be encouraged to run on together: Court, will suspend a Judgment in this, till they know the result of that. And where even a single prosecution, though in a Criminal Information, involves a question of Civil right, they will rather chuse to try the Right first in a feigned Issue, than go on directly in a Criminal way. *Policrites* knows I speak of every day's experience; and therefore cite no Authorities.

You will, however, be entirely satisfied with the cases of *successive* concurrent Jurisdiction; they
being

being instituted to redress any supposed grievance of either Party, who has Judgment against him in a Court below, and applies to a higher Court to correct the Errors which he suggests in their Proceedings. This universal gradation of *Appeals*, (by which I comprehend, in a large sense, every redress that can be had from one Court against the determination of another) I look upon to be one of the glorious characteristics of the English Constitution. The highest Court alone excepted, I do not know any one Court of Justice intrusted with final Jurisdiction. Without this reservation, you might well complain of those summary Jurisdictions, which branch out the executive part of Government into such innumerable channels, and serve the dispatch of Justice in that respect, in any other might be its Oppression. This redress from one Court to another, may be considered in two lights. 1. As to the power Superior Courts have over the Inferior. 2. As to the manner in which Proceedings of the Higher Courts themselves are to be redressed.

1. The first have a Power, 1. To forward Justice in lower Courts, having Jurisdiction; as by Mandamus to Ecclesiastical Ministerial Officers—to Corporations—to Trustees of charity; by Attachments to Sheriffs, and others acting as their own servants. 2. To prevent excess of Jurisdiction—as prohibitions to the Ecclesiastical Courts—Writs of Certiorari, to remove Proceedings from lower Temporal Courts: and of this kind are Injunctions from Courts of Equity. 3. To redress erroneous Proceedings in inferior Courts, where they have Jurisdiction. As by Writs of false Judgment from Manor Courts; Writs of Tolt, and others of that kind; and in many instances by Certiorari, or by Appeals from the lower Ecclesiastical Courts to the higher;

higher ; from the higher to the King in Chancery, who reviews their Proceedings by his delegates, appointed under the great Seal ; from Courts of Admiralty, and from the highest City Court to other Delegates ; from every Plantation Court in the British dominion to the King in Council ; from the Court of King's-Bench in Ireland, to the King's-Bench in England ; from inferior Courts of Equity to the Court of Chancery ; from all charitable Trusts, where no Visitor is appointed, to the Court of Chancery.

The Case of *College Visitors*, whom, perhaps, you will remind me of, as standing alone without Appeal, at first sight may seem an exception in a single instance, but at the same time is founded on reasons that distinguish that Case from all others. All other Jurisdictions whatever, are derived from the Crown ; and the Crown, by the Constitution, has in all these left a necessary reserve to itself of the final Execution of Justice. Charitable Trusts are derived only from private Property : and the Proprietor, acting consistent with the Laws of the kingdom, has as much right to model the distribution of it to all futurity, and appoint those whom he will intrust with the care of it, as he has to make a Will and appoint his Executors. And it is from the omission only of the Founder's appointment, that the Crown interferes as general Guardian in Ecclesiastical Foundations, or on the defect of Heirs to the Founder in Lay Corporations. And if the Crown, in either Case, at all interferes, where a Visitor is appointed, it is only to see whether he has Jurisdiction ; never to controul him when he acts within it. But the case of Visitors, which with respect to their determination is final, is however, not properly an exception to the general Law of the Land that establishes this right of appeal.

appeal. For the hearing before the Visitor is itself an appeal from some previous determination of the College: and even in these cases of private Judicature, I take it from clear principles of Law, the Visitor of a College without express authority from the Statutes, can no more proceed or interfere in the first instance, than the King's Courts in all other Cases that are intrusted with the determination on appeal, can proceed in the first resort.

2. The higher Courts themselves are, likewise, in every Judgment or Decree they give, liable to be controuled by Writ of Error, or Appeal in Parliament. Their Practice alone is left them absolute in their own hands; without which they could not proceed at all.

There is something so noble and elevated in this *last great stage of Appeal*, that it may challenge any nation to come near it: a Court consisting of persons who from their birth, their education, their estates, have the greatest opportunity of being well informed, and the least imaginable probability of being under an undue influence whatever; who are assisted by all the Judges, whose opinions upon any question proposed, they have a right to hear; and whose number, with all these advantages, exhibits the noblest Form of Judicature in the world.

Thus I have given you the best view I am able, in so short a time, of this large plan of Jurisdiction; the excellence of which, I must repeat to you, consists in the great accuracy, ease, and dispatch, with which Justice is administered by these subdivisions of Jurisdiction; and at the same time in the security of it, in leaving none of these Jurisdictions absolute and uncontrollable: in giving not only some Appeal from every Court to another, but often
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in a beautiful gradation of Appeals before it reaches the last resort.

§. 63. There are likewise some other particulars in this general sketch of the outlines of Jurisdiction, that must not be overlooked; because they seem to distinguish our Legal Constitution much to its advantage. By this I mean to remind you of the *occasional*, as well as *standing* distribution of Justice. The latter, I fear, I have been too full in explaining; much less need be said of the other, by which I mean principally the Institution of *Circuits*: and yet this, I think, is what distinguishes our Civil Administration from that of all other Countries. All States, antient and modern, seem to have regulated the distant parts of their Dominions, by certain residing Magistrates, whose Jurisdiction is fixed within particular districts: of which kind are the Governors of Provinces, in antient times, and of Plantations in our own and other modern European States. These, it is true, in all ages, have been under the controul of the superior Power of the State that appointed them: and yet, History, as well as Experience, informs us, the Administration of Justice has not flowed so smooth and uninterrupted, from that very circumstance of such Magistrates being fixed without any kind of Rotation; and particularly from their being placed at a great distance from the Center. If those who preside, are liable to influence in such circumstances; the derivative powers under them, must be so, for the same and much stronger reasons. It is hence, I conceive, the Romans, to meet with one inconvenience, and check one species of corruption, prohibited a Judge to sit in a Province where he was born. That Policy has, perhaps, not been so well copied in our own System, by a similar prohibition of a Judge upon the Circuit, from
sitting

sitting in a County where he was born or inhabits. If there were any grounds for the prohibition in our System, it should have been extended. The mere accident of birth, or the stronger bias supposed to arise from bare habitation, would apply with tenfold weight against an Owner of a large estate, whether he resided or not. That case is omitted by the provision; and yet, if a man was likely to favour his neighbours, he would be much more likely to be partial to his Tenants. Nay, if in Civil cases, where alone the incapacity arises, such attachments were likely to produce Corruption; much more it may be thought, would it be in cases of Blood. This exception was accordingly, from its own principle, originally extended as well as copied; but this large prohibition, aided with a penalty by the Statute of Rich. II. both on Justices of Gaol Delivery and of Assize, was, on account of its general inconvenience, directly repealed, as to the Judge of the Crown Side, by an Act of the late King; though in the Act of Hen. VIII. confirming the Stat. of Rich. II. as to the prohibition of the Nisi-prisus Judge, and omitting it as to the Judge of the Crown Side, it might seem to have been virtually repealed before. But it must be owned, limited as the incapacity still is, its inconvenience is daily felt. Its Policy, in our System of Administration, independent of its inconvenience, may very reasonably be questioned. For a Judge, in the Roman Law, (as in most Countries now) decided both on Law and Fact: our own, on the contrary, have not only the single province of deciding the Law; but their opinion, in point of Law, can never, (we have seen) be so final and conclusive as not to be liable to be reviewed in some course of Appeal. Their independency, in point of fixed salary, and their places now fixed for life,
are

are reasons that give an additional security for freedom in their Judgments. Their Rotation too, in this occasional administration of Justice, is something which distinguishes our legal Constitution from that of all others ; as much as the occasional administration itself. The Common Law (whether to secure the integrity of the Office to the Public, or to prevent the burthen of it to Individuals) has always approved of an annual or temporary, rather than a fixed delegation of Power. Of which kind are the Sheriffs, and all the subordinate Peace officers. Need I add, the Law had, formerly, as little idea of a Member of Parliament being fixed for more than a year, as it now has of a Parish Officer ? And though the judicial character (as it is proper it should be) is fixed ; yet, in this Form of Justice, the Public have the benefit of Rotation, if there is any. But this is a trifling circumstance, in comparison of the great advantages that redound to the Public from the exercise of this course of Justice.

It may be difficult to say, how antient this Institution of Circuits is : and rather than go too far back into so obscure a subject, I would enlarge a little upon its excellence. And its excellence principally consists in that exact and nice distribution of Justice, that every body may be said to have it at his own door. It may be compared to that antient method of cultivation, which consists in watering an extensive range of meadows, by dividing a large stream into so many small rills ; each of which communicates a verdure and fertility to the parts through which it runs, that could in vain have been expected, had the whole flowed collectively in one channel. The Institution, perhaps, will gather reputation, if we look back for some ages, between its first rise and the present. --Instead

of the Parties, with their Witnesses, and the Jurors, being obliged to travel all over the Kingdom to the King's Courts, which at that time of day were moveable; the King's Court, by the Institution of Circuits, is for a time (as it were) fixed in each County. And consider only, when roads were almost impassable, and so little accommodation for travelling, (as we may easily judge, by looking only a century back) how hard it would have been for every Suitor, to the expence of litigation, to have added this of travelling?

For a long time, however, only real actions were tried upon Circuits: the Statute of Westminster extended the Jurisdiction of Justices of Assize, to transitory actions, where neither in point of value, nor length of time, the Examination before them was thought too great. And now this excellent provision is, as it long has been, extended to every trial of fact that must be decided by a Jury.

But besides the dispatch of Justice, which Circuits are principally calculated to promote, they are the means of *diffusing* Property as well as *deciding* it. The surprising concourse brought on this occasion, from all parts of a County to the assize town, which is generally chosen as near as can be to the centre, greatly contributes to the opulence of those places, by promoting Inland Trade. So that this kind of circulation, so quick for a time, may be said to produce a kind of political health to the County for the whole year. Then consider, in a nobler view, the lustre these meetings acquire from the presence of some of the principal persons in the kingdom; many of whom, after having served their Country in the highest stations in the Metropolis, now come to do it service at home. Add to all this, the gaiety that commonly accom-

panies

panies these solemnities. Let your recollection only rekindle your fancy ; then you will picture to yourself, in such a concourse, the lively images of Milton.

—————The busy hum of men ;
While throngs of Knights and Barons bold,
In weeds of Peace high triumphs hold.
With store of Ladies, whose bright eyes
Rain influence—————

You will allow this is a pleasing picture of these Assemblies ; and not unlike the generality, though the colouring may be too high for some.

§. 64. From this view then, it appears, that the Public, almost in every shape, is the better for this excellent institution. And, because I am going to say a few words on the analogy many of the parts of our Administration bear to the whole ; the subject we are now upon, points out one remarkable similarity between the *Ecclesiastical* and *Civil Polity* of this Country. The Visitations of the Clergy by the Bishops in their respective Dioceses, bearing no inconsiderable resemblance to the Institution of Circuits ; as their Convocation, composed of the King as their head, an upper house of Spiritual Lords, and a lower of the Commons, does to the Parliament. So true is it, as Sir H. Spelman has somewhere observed of our Government, “ that each side of the Arch descendeth alike.”

The analogy, however, that subsists between the parts of Civil Government, compared with the whole, is much more remarkable than that between the Ecclesiastical and Civil Powers. Not to be tedious, I shall instance this only in two particulars ; our *Civil Corporations*, and our *Colonies* abroad.

Corporations may be said (like the Constitution of which they are a part, and the Government to

which they are subordinate) to contain a Monarchical, Aristocratical, and Popular Power; the Mayor, Aldermen, and Commonalty, or whatever other terms distinguish the person presiding, from those over whom he presides in a Corporation, with their gradations of Power, resembling the King, Lords, and Commons in the Constitution.

And in our Colonies in general, the Governor, his Council, and the Assembly, have the same analogy and resemblance. Both Corporations and Colonies conform likewise to their great archetype in this; that they are both governed by some kind of Charters or written Laws, the construction of which is derived from established usage or Common Law.

The origin of Government, however, in both these, differs from that, though the Form, as to the delegation and distribution of Power, substantially agrees; the supreme Magistrate, as well as the other internal parts of the Community, being elective both in Corporations, and occasionally appointed in our Colonies; though hereditary in the Constitution: the Constitution, I need not add, gains greatly indeed, by the comparison. The resemblance I have ventured to point out in both, must be understood to be, in general only, not absolute and universal. For on the one hand, in many Corporations, the distribution of power is anomalous; and, on the other hand, our Colonies, taken all together, may be said, in their turn, to exhibit every form of Government. The divisions of them into Regal, Proprietary, and Charter Governments, corresponding, in effect, to those of a limited or absolute Monarchy, and a Republic. But as what has been said applies principally to the *Regal* Government, of which the greatest number consists, so far the conformity does obtain. And

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as far as it does, they are beautiful instances of political structure ; simple, uniform and harmonious: like those several Planets in our System, each performing motions in its own orbit, while, at the same time, in its revolution round the Sun, it is admirably subservient to the interest of the whole. And our Colonies, one would hope, must be convinced (as experience in the end will certainly teach them) that they give up their happiness whenever they quit their dependence ; and like the Planets, must at once lose their light, heat and activity, when their motions cease to be at all regulated by the Center of their System. The word, *mother country*, is itself forcible enough to explain the relation, and the duty that mutually results from the relation. The first settlers, and consequently their descendants, are derived from the same common ancestors : the term therefore implies on the one hand, some analogy to the subordination and obedience of a child, and at the same time it as evidently implies on the other the tenderness and affection due from a Parent.

§. 65. Perhaps it would be an omission in this draught of Jurisdiction, if I did not mention the intercourse between our own and other nations, for the mutual execution of Justice. As Commerce has so variously connected the interest of mankind with each other, however separated by distance of place, or political district ; any Nation, our own in particular, considering the extent of its negotiations, would be much wanting in its administration of Government, if it made no provision to protect the Rights, and redress the Injuries of *Foreigners*.

Every Government, I take it, has a Right for its own Preservation, to prescribe, by settled Laws, how far it will admit the intermixture of *Foreigners* ;

reigners ; and what Civil Rights it will invest them with. On the contrary, every Government, for the same reason, has a right to prescribe, How far it will permit the absence of its own Members, in Foreign parts ; under what Restrictions ; and to punish those Members who desert its Service, at the time their own Country stands in need of it.

As to the first, the Law of England is sufficiently favourable to Aliens for the purpose of a mercantile residence. It endows them with the full right to personal Property ; and protects them in the enjoyment and disposal of it, as much as it does its own Subjects. Protection and Allegiance, are in all cases reciprocal : and therefore, those who for certain purposes acquire a Protection for their persons and their effects, must, in certain respects, have a local, limited, and partial allegiance to the State where they reside : though their natural Allegiance to their own Country remains for ever firm and indelible : natural Allegiance, and the Defence of our Country, being (the same as *Tully* has said of Self-Defence) *non scripta sed nata Lex : quam non didicimus, accepimus, legimus ; verum ex Naturâ ipsâ arripimus, hausimus, expressimus.* As far then as the purposes of Residence require, Aliens are considered as subjects, and alike responsible for their conduct. They can not be considered as Subjects, to acquire or derive to others permanent real property, or to fill places of trust : because this requires a stricter Allegiance and closer ties to this Country, than they can observe, either for the purpose of their Residence, or consistent with their native Allegiance elsewhere. It is pleasant to observe, how the Law of England breathed this liberal spirit to Foreigners, even while Trade was little more than in its Infancy. There is no occasion to cite a passage in *Magna Charta*, to which I allude.

§. 66. It is full as necessary for the preservation of any Society, that it should have a power to regulate the absence of its own Members. Few instances, indeed, occur, which make it necessary for this power to be put in execution; but it would be bad Politics, as well as bad Logic, to argue from the want of exercise, to the want of existence of such a Power.

Any person may, if he pleases, quit his native Country for ever: but then he must give up his Rights, at the time he withdraws his Subjection. Because, if the Society should have occasion for his service, (of which the Society itself is the judge) it will not be at his option to choose whether he will assist it or not; to continue abroad, and at the same time to expect, that those at home should exert themselves in preservation of his Rights.

If he, upon notice, refuses his assistance, the Society may punish his disobedience, by confiscating his Property. And what the Society may do to enforce his attendance in necessary cases of Defence; it may do, on stronger reasons, to enforce a member to appear who absconds from Justice; or it may imply his guilt from his flight, and seize his effects to make restitution to the State for his criminal conduct.

This power over its own Members, I take to be inherent in all Societies. The Law of England, we shall see, applies this doctrine as to its own Subjects. It is on this ground that the Constitution enables the King to restrain his Subjects, in certain cases, by Writ, from departing the Kingdom; to outlaw, or deprive of all Civil Rights, those who fly from Justice; and to prohibit, under necessary Restrictions and Penalties, those who, induced by imaginary prospects of gain, can so far forget their own Country, as to enter into Foreign service, and
export,

export, as far as their abilities reach, the Arts and Manufactures of this Country to rival nations.

Thus, *Philander*, though your Country did not stop you from your travels, you see it might have done it, upon immediate occasion of your service: you, I am sure, will repay your Country for this Indulgence. by the greater service your experience in Foreign parts, joined to the knowledge you will acquire of affairs at Home, will enable you to perform.

§. 67. It yet remains behind to consider, whether the Laws as well as the Subjects of other Countries, do at all fall under the consideration of our Courts.

In many cases, where questions arise between Foreigners and our own People, the Courts here will take cognizance of the Laws of other Countries, properly attested. And I do not suppose, especially where Foreign Laws were the grounds of the Contracts, that this was ever refused. But it well admits of a doubt, if English subjects, residing in Foreign countries, do make Contracts abroad, which being contrary to the positive Law of this Realm, could be aided by no Court of Justice, if made here, whether our Courts will give them any sanction, merely because the contract was not contrary to the Law of that place abroad, where the Parties resided at the time of making it. It was, indeed, made a question, in a still more unfavourable light, whether a contract made abroad, contrary, both to our own Law, and the Law of the Country where it was made, could be aided by our Courts of Justice? The case, in which this point arose, was determined upon far other grounds: the point itself, I believe, was never determined.

For

For the same reason, founded on the noble ends of Justice, that our Courts will support Foreign contracts, will they give credit to the Proceedings of Foreign Courts, properly attested, and having compleat Jurisdiction.

Indeed, Justice could never be done in any one Country, unless there was that universal good correspondence of one Country with another, in support of it.

And the reasons that may be urged for aiding Justice in Civil cases, hold infinitely stronger when applied to Criminal. The interests of Society itself, in general, are so deeply involved in this respect, that it can never be the real interest of one Country to nourish an impious Criminal in its bosom, who flies there for refuge against the Justice of his own. And I scarce understand Lord Coke's doctrine on this point,—“ That Foreign kingdoms, even in league with one another, are Sanctuaries for any subjects flying from one another.” How has he supported it? He says, “ it is holden, and so it hath been resolved ;” but he neither tells us *when*, nor *where* it was resolved. His examples from History are far from proving the point. The first, from Q. Eliz. time, shews good political reasons, why her demands were not complied with; because she had before done what she complained of. That from Hen. VIII. does not seem to prove any thing: and that about Pool the Earl of Suffolk, being delivered by the Court of Spain, proves (if any thing) the point I am contending for, and consequently is in the teeth of Lord Coke's own assertion.

Possibly there may be instances, from History, in support of his assertion, in later times, even when the Law of Nations and Government was better understood, or more strictly canvassed. Bi-
shop

shop Burnet, I remember, relates his own case, which is, in point of Fact, agreeable to Lord Coke's assertion.

But the assertion itself seems directly against the Law of Nations; by which Societies are so far from having a power of injuring each other, that they ought, as Individuals ought in a state of nature, to give all mutual assistance and protection, consistent with their own preservation.

But History, though it will not make the Law in this respect, is too apt to encourage the practice by recording the Facts: and these imaginary interests of nations, often disguised under the specious name of Reasons of State, are too apt to prevail against the real Interests, ever founded on solid Justice.

Nor have the methods taken to guard against abuses of this kind, always been more defensible than the abuse itself. One way has been to seize the party privately, and convey him to his own Country. Another, to prevent protections of Foreign States in amity, by express clauses in a Treaty. I shall only observe, upon these two Methods, that the latter, though the only just one, is a prudent rather than a necessary precaution: as such a clause in a Treaty, only operates as a recognition, not a creation of Right. For if, from the very nature of Society, Subjects are answerable to their own nation for their criminal conduct: by the Law of nations, they may be justly demanded of Foreign States to which they fly: and the refusal of delivering them up, is a just cause of War.

But on the other hand, if a Criminal flies from his own to another State, for refuge; his own can not seize him there by violence. The case, in this respect, is much the same as (though stronger than) that of pursuing an enemy's ship under the protection

tion of a neutral Port. In both cases you are first to apply to the Justice of the Country; if that is refused, you may resort to war at your option.

Thus it is that all nations are bound to assist each other in promoting the ends of Justice: they have their reward in doing so, by carrying on, at the same time, the end of their own preservation. Our Constitution has made sufficient provision for doing it; and can not be complained of on this account.

§. 68. Thus have I run over all that occurs to me upon this subject of the *English Constitution*. I am thoroughly persuaded of the imperfection of this sketch, by way of doing Justice to the subject; yet, I am inclined to think, enough has been said in the course of our conversation, to excuse me from the imputation of any intemperance in such frequent encomiums on its excellence. Though fired with such a theme, had I fallen into excess, I would own it with pleasure, as *Tully* did in speaking of *Plato*, *admiratione quadam commotus sæpius fortasse laudo quàm necesse est.*

I hope it has all along been understood, (for I have taken it for granted) that the essential frame and structure of the Constitution is a thing independent of the actual exercise of Government. As different as the execution of a Law from the Law itself; or the conduct of any particular men from the abstract nature of Morality. Nobody would judge of the excellence of any rule, from the accidental observance or neglect of it. It is sufficient that the Constitution, in its own nature, is best adapted to promote the happiness of Society; that its freedom and restraints are so admirably poised, that as little as possible, of natural Liberty, is given up; at the same time that the good of Society is, as much as possible, secured.

But

But though the actual exercise of Government is, at all times, quite another consideration from that of the original frame of it; yet, the excellence of our own form of Government, is remarkable even here: that in cases where the Administration has actually overstrained the Constitution, there is something in the temper and spirit of the People so admirably suited to the Constitution, that the remedies have commonly followed the distemper: and the Constitution, in the end, has been restored, though not in every case without violent convulsions. But, however, a torrent has of a sudden swelled the stream, and threatened to overflow the Country; it has, at length, sunk within its proper channel, and run smoothly on in its course.

§. 69. I shall not scruple to add, that in this growth (as it were) of the Constitution to maturity, through so many ages, time has furnished it with many real and solid acquisitions. This would be fully evident by considering the gradual improvements in each successive reign. A subject so copious is entirely out of our present reach; it would besides require a masterly hand to make it interesting without being tedious. Lord Hale (as far as his subject would permit him) has shewed the way, in one particular track; and I do not despair of its being one day executed on a more extended plan.

But, the most general recollection, without any regard to dates or precision, will serve to remind us of the comparatively greater happiness we enjoy under this Constitution, than what our early Ancestors did. Freedom was always of its very essence; but its freedom has been improved. Nay, even many political storms themselves, besides recommending the succeeding calm, have been followed

lowed with a much greater serenity, than ever preceded them.

Think ever so little of the miseries formerly occasioned by the unsettled succession of the Crown; the struggles between the Crown, and the Church; the Pope siding with either, as either had power to dispute or defend his usurpations. In the mean time, what was the political degradation of the Kingdom in those days, when it was alternately subject to *Dispensations* or *Interdicts* from the See of Rome? Think how these constantly tended to ripen seeds of Rebellion, when assisted by the excessive power of the Barons, and the frequent absence of the King in Foreign dominions: at a time too, when every great Baron had his Castle, which, according to his own caprice, he would convert into a Garrison, either for or against the Crown? Think too of the provisions made for the security of our property and persons in Magna Charta, the Habeas Corpus Act, and the Bill of Rights; of the abolition of the Forest Laws, and of the rigours of the Feudal System. For though this System in its original was undoubtedly founded on the best principles of human nature, those of *generosity and gratitude*; yet, pursued through all its consequences, time has sufficiently shewed us, that it by no means suited the genius of a free and commercial Country.

Think too, when with such pains the purity of Religion was restored by the *Reformation*, of the care that has been since taken to preserve the stability and freedom of it, by the *Test and Toleration Acts*: that on the one hand, an Indulgence might be given to the scruples of men in points of worship, that do not interfere with the subordination of Government: on the other, that as far as the exercise of Government is concerned, the profession

sion of the established Religion should be the necessary terms of an admission to a share of the Government.

Think too, of the much greater impartiality in the manner of administering Justice at this time than formerly; and the additional advantage to the Public, from the seat on the Bench being fixed for life. Think of the pains that have been taken to preserve a disinterested choice of Members of Parliament, and their free conduct in it. That these provisions, in the first case, have at times been wanting in their effect, is to be attributed, perhaps, more to a relaxed execution of Laws, than a defect in the frame of them. That might be the case of any future provisions of this kind. Think too of the free manner of passing Laws; the Crown and Parliament both open to Petition; the free course of Laws when passed; no *Non obstante's*, or Dispensations; no Money levied on the Public but by Law; no exactions under the specious titles of Loans and Benevolences; no Oppression of the Subject by Purveyances, and other arbitrary pretensions of Prerogative.

I might add, the further security we have for the internal tranquility of our Country, by all parts of the Island, and of the Dominions of the Crown, being brought under a more regular subordination, by the settlement of Ireland and Wales, and the Union with Scotland. Much might be said too, on the great improvements in the face of this Country, by the establishing of Posts, and opening universal channels of communication, by the making of Roads and navigable Canals: and of the infinite resources Trade has acquired from the connection with the Colonies.—But these are endless topics; and had I not already given the fullest

fullest exercise of your patience, the time of day would release us from such a wide range of disputation.

§. 70. I shall hasten, therefore, to a conclusion: and after all we have said, does it seem too much to assert, that, every thing fairly considered, the English Constitution may stand the most rigid tests of History and Experience, to have its excellence justly weighed; and that it may be compared with those of any Age or Country?—That it wants few of those improvements, which the boasted plans of perfect Commonwealths, those idle dreams of mere speculative Politicians, have obtruded on the world; often without knowing the real nature and genius of their own?—And that it is not affected (if the whole is taken together) by those little strokes of Satire in the celebrated draughts of fancy, in the *Utopia*, *Atalantis*, or *Hounbym Land*?

And as far as it is in the power of good Laws, in aid of the Constitution, to make good Subjects, we are happy above all others. And yet, when I say this, I do most heartily join in the wish, that our Body of Statute Laws were to be thoroughly and maturely reviewed. Their perpetual increase even on the same subjects, is an additional argument, that Lord Bacon who recommended it even in his days comparatively wanted: and in time of profound Peace, it would perhaps be as great a Service, and public Blessing, as the Parliament could bestow on the Nation! But as to the bulk of our Laws, considered merely in itself, I own, I do not see it in the light some affect to place it in. It has, indeed, been well observed by Tacitus, *corruptissima Respublica, plurimæ leges*. But I would consider the multiplicity of our Laws in a more amiable light; not so much as the consequence of Corruption, as of a jealous regard to Liberty. Our Constitution,
by

by particularly defining every thing by Law, leaves us free in every case where the Law does not oblige: and, therefore, the Law, to reach all cases, and not be arbitrary by construction, must, in its nature, be voluminous.

But a number of Laws, if they are Evidence of Corruption, are made, at the same time, to check its progress, and to secure us from its effects. I know, in confirmation of Tacitus, it is a settled observation, (Aristotle made it of *Greece*, Sallust afterwards did of *Rome*, and the Fact still is so in *America*) that Infant States are governed by *Manners* rather than *Laws*. But this will scarce ever be the case of Societies in a more advanced age. The truth is, the very temptation to Crimes scarce exists in the infancy of Society. The weeds grow up with the fruit: the more modes of property increase, will likewise the modes of violating property gain ground. Not but that *public Manners* must always, in a great measure, correspond with *Laws*; or Vice will, with ease, be too strong for their Chains. The very riches of a State do, in their own consequence, introduce Vice; which is one reason, we are told, why many antient States were averse to Commerce: because Commerce, by importing Foreign luxuries, tends to set the Manners of the People in *Opposition* to the Laws, and by degrees produces a spirit of Licentiousness that is *above* them.

But the inference against the riches of a Kingdom, or the toleration of Commerce, because it may multiply Vice, is as idle, as contending that Vice itself should be tolerated in Society, because private Vices are, in many shapes, productive of public Riches: which is a maxim so destitute of solid reflection, that it has not probability enough for a *Fable*. In both cases, the remedy is apparently

rently to be had from other quarters. Public riches may be promoted without the assistance of Vice; and Vice, though it may be introduced by Commerce, may be restrained by other means than the restraint of Commerce itself.

§. 71. I know of no way more effectual to restrain it, than by good education of Children, and good examples of Parents. Without the latter, the best impressions acquired from the former may be soon effaced: where it prevails, its influence will extend to the utmost verge of domestic authority. And can it be doubted, whether that subordination and regularity that grace a Family are most likely to be serviceable to a State? Let every one, therefore, in his own house, have a kind of *Persian School of Justice*. Let the foundations be laid early for making a *good Man*, and a *good Christian*; which will, in due time, form the most perfect character in this world, (as comprehending those two, or rather giving full scope to the latter, by enlarging the sphere of Virtue to its utmost) in completing that of a *good Citizen*. Then the Laws will have the best effect, that can even be wished for in theory, that of *being a Rule in all cases, rather than a Restraint in a few*.

§. 72. Nothing more passed, material on this subject; and with it the conversation closed: for as the showers, which are usual at this time of the year, had served to lengthen the conversation this morning, by keeping the company within doors; and the sky began to clear, *Eunomus* proposed a walk before dinner, which was readily agreed to by *Policrites* and *Philander*.

N O T E S
ON THE
THREE DIALOGUES
CONCERNING THE
LAW AND CONSTITUTION
OF
E N G L A N D.

Count the proofs I have collected,
To have my writings well protected ;
These I lay by for time of need,
And thou may'st at thy leisure read.

PRIOR's Alma, Cant. II.

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P R E F A C E

TO THE

N O T E S.

THIS part of the work having been put together some time after the date of the rest, and yet being, in a manner, the support of the whole fabric; it is necessary to say one word, as to what arises from so considerable a variation in point of time, before I enter on the immediate subject of the present observations, the Notes themselves.

I only desire, in order to lessen some imperfections that arise from this very source, to establish the authenticity of the dates themselves, and trust the Reader will give me credit for the assertion when I assure him, that the Dialogues and Notes were actually written and printed at the respective times they bear date: and that the Notes, though originally conceived
as

as a necessary accompaniment in some shape or other, were not till very lately brought into their present shape.

This observation will entitle me to some indulgence, in passing over some little improprieties in the Dialogues, which are to be laid to the account of time only.

In one place, for instance, there is an allusion to a set of characters that at the time all united in displaying their excellence in the same scene of action, but are now dispersed in various departments; some in the most elevated rank in the State, as well as in the Profession. Had I not in that part of the Dialogue rested content with a faint allusion to a few private characters, the text would have still wanted a greater comment: the elevation of some from the bar to the bench; the quick transitions from one bench to another; and the various successions on the same bench, would all have contributed to depreciate the design of drawing a portrait, that was to be known only from the robes given it by the painter; especially when, after all, those great models will be much better characterised by their own eloquence and abilities, in cohorts that will scarce fade, till time itself does. Had I indeed attempted, for instance, to describe those three very eminent persons, now living, who have been last successively appointed to preside in one single Court of*

* About the year 1767.

Law, I should have shrunk under the weight of my subject. How again could one feeble voice echo those notes, which the Muse itself had sounded so long ago, when it proclaimed the Fame of him*

——Whom nature, learning, birth conspir'd
To form not to admire but be admir'd.

Who, besides himself, can do justice to a reputation that, like a river, is perpetually spreading in its course, 'till it is lost in the great ocean of Eternity? Fortunately therefore for me, the canvass was left a blank, not only from the difficulty of the undertaking, but as, in many instances, time so soon varies the portrait.

Things are, in their nature, more fixed and invariable than persons: and if the great outlines of the Constitution are deduced from principles (as it is hoped they are) there will be less reason to apprehend the work will suffer in its material parts, by the accidental fluctuation of this or that prevailing party or opinion. Many points in the principal Dialogue have been the subject of public debate, as well as private discourse, since the writing it: I can only say, however my sentiments happen to coincide or disagree with those of the world, truth alone was my object at the time; and however a juvenile fancy may have unawares dressed up error in its form, I may sincerely assert that I have in no one instance endeavoured to mislead or

Pope's Imitat. of Horace, ep. 6. v. 39.

misrepresent.

misrepresent. This will entitle me to candour from all who profess to differ from me; though I shall add, I am not conscious that I have advanced any thing material upon the subject that ought to be retracted. If I have done this in one or two minute trivial citations, it would very ill become me to defend an opinion in points of importance against conviction.

*Indeed I was so little satisfied with leaving a discussion of so great a subject as that of the English Law and Constitution, on the mere reasoning of the persons in an imaginary drama, that I all along conceived a design of communicating to the reader, some of those authorities which, from general reading, had led me into such a train of thinking. As I was ambitious of having what was advanced, have more weight than what the air of conversation alone will allow it, (notwithstanding all the advantages proposed to myself from the form of discourse) I could not leave it to be supported merely by the declaration of the speakers: and therefore as "these our actors (like those of Prospero in the Tempest) are now melted into air;" it was incumbent on me at the end of the play, to dissolve the enchantment, and shew things fairly to the reader as they are. And it will be, no doubt, a satisfaction to find the notes prevent giving unlimited credit to the text: that it is Lord Coke, for instance, that often speaks by Eunomus, without the formality of being mentioned; and that, by a kind
of*

of Pythagorean transmigration, several great sages, both of antient and modern times, are in a manner made to animate the fictitious persons of the Dialogue.

Reason and example both induced me to separate the notes entirely from the text. Great authorities may be urged for it, both in History and in Dialogue. The laws of conversation in particular, would disdain the affectation of citing page and verse : and the notes thus set apart, may support, without embarrassing the composition.

This place too, if any, will justify some considerable extracts made from books in different languages, from a desire to do justice to the authors sentiments by giving them in their own original expression. In this respect what would be unpardonable in the Dialogue, it is hoped, does not want excuse in the notes. Many an English gentleman would with reason be displeased at being made party by surprise to a conversation made up of as many different languages as the persons who composed the company : But nobody who was carried to the Royal-Exchange, which he was told beforehand was the resort of merchants of different nations, would be out of humour at hearing a Greek, an Italian, or a Frenchman, speak in his own language. Every body in this case has his own remedy, either not to go among them ; or not to listen to them at all, if they are unintelligible. If, when it was meant to make some of them more generally communicative,

our friends of antient Greece have had the misfortune to have but a lame interpreter, the learned with their usual candour will overlook it.

The notes themselves have, unawares, grown in their progress; their plan having been extended in the execution much beyond the original design: as they now comprehend several occasional remarks, as well as the authorities abovementioned. Some few other particulars must just be mentioned. To keep them within a tolerable compass, it was thought much more adviseable in general to refer to the books, rather than to cite the passages in them alluded to in the Dialogue. Wherever various editions are cited, they are pointed out.

As to the reasonableness of the present bulk of the Notes, I am the last judge in the world in my own cause; but though it is more probable I am guilty in the excess than in the defect, yet it may be thought I have been too sparing in some places, however over-copious in general; many entire pages, in succession, being totally unnoticed in this review, and the argument left to stand or fall by its own weight. To this I can only say, that in those places no particular authority could be cited, because none, in reality, was particularly in view. The passages in those instances being conclusions formed in the mind in a*

* As for instance, in Dial. II. in the general analysis of Practice, and Dial. III. in the sketch of Jurisdiction; the reasoning from the law of nature in the latter end; and the historical recapitulation, &c. &c.

train of thinking, acquired from a course of reading; and the particulars that gave the first rise to them, had long vanished, and were no more to be recalled in the memory, than a picture in the mirror when the object has disappeared.

*I flatter myself, the great variety of authors that have been referred to, by way of authority or illustration, in the course of these notes, will rather prove an apology for the whole performance, than stand in need of one. At least, if the reader has the same pleasure in going back to the fountain head, that I found in drawing from thence, we shall neither of us repent of our pains, and why should we not part good friends with each other? In those hopes, at the conclusion of the work, I will finally address my Readers in an humble application of the words of the celebrated President de Thou, in his letter to Henry the Fourth of France, prefixed to his History.—“ A nostris aliisque, qui
 “ hæc legent, peto, ne quid præjudicati secuta
 “ domo adferant; neque de hoc opere priusquam
 “ eo perlecto pronuntient. Inceptum viribus
 “ nostris majus esse, et ad illud multa, quæ in me
 “ non sint, desiderari, inficias non ierim: sed
 “ vicit utilitas publica, et ardens de mea, postera-
 “ que ætate, promerendi studium, cui dum con-
 “ fulerem, temerarius quam ingratus haberi
 “ malim.”*

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N O T E S
ON THE
D I A L O G U E S
CONCERNING
The LAW and CONSTITUTION of
E N G L A N D.

NOTES on the ESSAY ON DIALOGUE.

PAGE xii. l. 19. *Choice of Hercules.*] This beautiful allegory has been imitated by some masterly hands; in our own language, it has been the subject of the excellent poem inserted in Spence's *Polymetis*, and Doddsley's *Collection*, vol. iii. and in Italian by Metastasio in his *Alcide al Bivio*. vol. x.

Page xiii. l. 9. *Invention and fancy are of the essence of Poetry.*] A similar idea in Mr. Gray's admirable ode, where the *Poet's eye* is represented as discovering

*Such forms, as glitter in the Muse's ray
With orient hues, unborrow'd of the Sun.*

Page

Page xiii. l. 13. *Any composition, if coloured over by fiction, approaches more or less to the nature of poetry.*] “ Il est de beaux poemes sans vers comme il est de beaux vers sans poësie, et de beaux tableaux sans une riche coloris,” says the Abbe du Bos, *Reflex. Critiq.* vol. i. c. 48. And to the same purpose Boileau adds,—“ Ces poemes en prose que nous appellons Romans, &c.” *Lett.* 4th to Mons. Perrault. And one, whose example in writing the serious and comic, has not a little fortified his opinion, tells us—“ que la Epica tambien puede escri-
“ *virse en Prosa como en verso.*”

Page xiv. l. 19. *A Poet will sometimes throw events into Allegory, &c.*] It seemed not amiss, to add an instance of each of these methods, which, though not all taken from professed didactic poems, will sufficiently explain what is meant in the Essay 1. Will throw events and ordinary occurrences into Allegory—as in describing the mixture of happiness or unhappiness in human life, in the proverbial style, by that of “ cloud and sunshine,” or saying “ the day is sometimes a mother, sometimes a step-mother.”

Ἀλλοτε δ' αὖ Zeus μὲν πίνει αἰθριος, αλλοτε δ' οὐει.

Theocrit.

Ἀλλοτε Μητρειη πίνει Ημεραι, αλλοτε Μητηρ

Hesiod. Oper. et Dies. v. 825.

2. Will mark what he describes by probable consequences—as in the first Georgick.

*Sin maculae incipient rutilo immiscerier igni,
Omnia tunc pariter vento nimbisque videbis
Fervere. Non illa quisquam me nocte per altum
Ire, neque a terrâ moneat convellere funem.*

Ver. 454.

3. Instead

3. *Instead of formal comparisons will rather hint the resemblance in the application—as in that pretty fragment of Moschus on the death of Bion.*

Αἰ Αἰ ται μάλα χαί μιν ἐπαγ κατα Καπὸν οὐρανῶν,
 Καὶ τὰ χλωρὰ σείλινα, τὸ τεύθαλις κλον ἀνήθον,
 Ὑπερον αὖ ζῶοντι, καὶ εἰς ἔτος ἄλλο φροντι.
 Ἀμμις δ' οἱ μεγάλοι, καὶ καρτεροί, ἢ σοφοὶ ἀνδρες
 Ὅποτε πρῶτα θανώμεν, ἀνακοῖσι ἐν χθονὶ κείλῃ,
 Εὐδοκίῃς ἐν μάλα μέκρον ἀτέρμονα νυγρετον ὕπνον.

Ver. 100.

*The Field, or Garden, many a plant supplies,
 That after blooming at its season dies ;
 Yet only dies more blooming to appear,
 The pride and glory of another year :*

*But we, however great, or brave, or wise,
 When in " that Sleep of Death " we close our eyes,
 Still, after ages in the silent tomb,
 Have the same long unbroken rest to come !*

The same kind of thought (not uncommon among the antient Poets) has been sweetly expressed by Tasso.

Deh mira (egli cantò) spuntar la rosa
 Dal verde suo modesta, e verginella,
 Che mezzo aperta ancora, e mezzo ascosa
 Quanto si mostra men, tanto è piu bella.
 Ecco poi nudo il Sen già baldanzosa
 Dispiega ; ecco poi langue, e non par quella,
 Quella non par, che desfiata avanti
 Fu da mille donzelle, e mille amanti.

*Così trapassa al trapassar d'un giorno
 Della vita mortale il fiore, e'l verde :*

* Hamlet, A 3. Sc. 2.

Ne

*Nè perchè faccia indietro April ritorno,
Sì rinfiora ella mai, ne si rinverde.*

Canto. 16. stanz. 14.

Page xxiv. l. 27. *Considerable names among our own writers.*] To those mentioned may be added Lord Bacon's and the Duke of Buckingham's. Sir Thomas More is said to have written several dialogues. Wood's Life by Hearne, p. 31. but I do not find that they were ever published.

Page xxviii. l. 15. *The law is a polemical art.*] Lord Coke approves much of the saying of Sir Richard Hankford, a Judge in Henry the Fourth's time. "Home ne scavera de quel metal un campane est, si ne soit bien bate, ne le ley bien conus fans disputation." 1 Inst. 395.

Page xxx. l. 9. *Axiom.*] Lord Bacon, in his Advancement of Learning, has considered the respective merit of "axioms" and queries" as applied to the tradition of knowledge in general. Vol. I. fol. edit. p. 71. and see Dr. Beattie on Truth, p. 31. and p. 208.

Page xxxi. l. 16. *Famous law case.*] Bushell's case in Vaughan's Report.

Page xxxii. l. 35. *Has not left the reader in doubt of the true opinion for which some of the Antients have been censured.*] This conduct in some resulted chiefly from the principles of the academic Sect. Dr. Beattie has answered this imputation on Socrates, in his admirable Essay on Truth, p. 249. &c. 2d. Edit.—Many passages might be cited, from the Memorabilia of Xenophon, which are an undeniable vindication against this charge. See particularly, lib. 1. c. 1. § 19. *ibid.* c. 4. § 18. lib. 2. c. 6. § 5. *ibid.* c. 7. § 9. and Socrates himself has abundantly answered this insinuation, lib. 4. c. 4. § and c. 6.

Page

Page xxxiii. l. 7. *Attempt of the reigning favourite to bring in the Civil Law.*] William de la Poole, Duke of Suffolk, and others mentioned,

3. Inst. 35. *

Page xl. l. 8. *Dr. Middleton was told.*] See Dr. Rutherford's defence of Bp. Sherlock on Prophecy, p. 3.

Page xl. l. 33. *Grecian artists expressed themselves in a mode of language implying imperfection.*] See Plinii Nat. Hist. Exord. § 10. or Mr. Harris's Hermes, p. 137.

Cc

NOTES

N O T E S

ON

DIALOGUE I.

PAGE 5. l. 15. *And certainly the imitative arts must necessarily be capable of assisting each other.*] The assistance poetry has afforded to the other imitative arts may be evident from the very early and well-known instance of Phidias's Jupiter, copied from the first Iliad. And it is somewhere imagined, with great probability, that in the famous picture of the sacrifice of Iphigenia by Timanthes, the admirable thought of expressing the highest degree of grief "by the veil," was borrowed from Sophocles.

———Ως δῖσιδὲν Ἀγαμέμνων Ἀνάξ
Επὶ σφαγᾶς σιχῶσαν εἰς ἄλσος κορὴν
Ἀνεστῆαξ· κάμπαλιν σρεΐας κατὰ
Δακρυὰ προήγεν, "Ὀμμάτων πέπλον προβείς."

*When the great prince his lovely damsel saw
Proceed a victim to the sacred grove,
He groan'd ; and rais'd his mantle to his face,
To vent the torrent of his grief.—*

The history of that famous painting of Timanthes is described by Pliny, Nat. Hist. lib. 35. c. 10. where other instances of imitation from poets may be met with. On the other hand the poets (if they have not borrowed ideas from painters) have

have commended and described with rapture several pieces of sculpture and painting. The description in Virgil, lib. 8. v. 631.

———*geminos huic ubera circum*
Ludere pendentes pueros———

it is supposed was borrowed from the famous statue in the capitol, mentioned by Tully in one of his orations against Catiline. Dr. Middleton's Letter from Rome, 35.

And it is not improbable that the pictures at Carthage, described in the first Æneid, were remembrances of some pictures well known in Virgil's time. In the Anthologia Græc. lib. 4. the *Philoctetes* of *Parrhasius* is finely described; and in the same collection, the *cow* of *Myron*, and the *grapes* of *Zeuxis*. In Theocritus, first Idyll, there is an almost graphical description of a piece of sculpture that was most likely then existing as the poet's model. Every body knows the fine compliment paid to the Venus of Apelles by Ovid.

Si Venerem Coüs nunquam pinxisset Apelles,
Merfa sub æquoreis usque lateret aquis.

And without being tedious in the mention of particulars, a catalogue "of antient pictures and sculptures" might almost be formed even from the Greek epigrams that remain.

The thought of Timanthes and Sophocles above mentioned, as to the manner of expressing grief, remind me of a very fine passage in Euripides, *Iphigenia*, Aul. v. 465. where the poet is equally successful in the artifice he uses to heighten his subject: a very young infant is represented as bursting

into tears on the distress of the family; but it is the poet's observation that gives those tears their true force and energy.

Παῖων δ' Ὀρέτης ἑγγυς ἀναβουβούλει
Ὁν συνέλα συνέλως· εἰς γὰρ ἐστὶ νηπιός.

*Orestes too with tears shall swell our grief,
Unknowing why he grieves, as yet a child.*

Shakespeare, in copying only nature, has hit upon two or three similar instances, that I cannot resist citing upon this occasion, as happy comments on Euripides. In his *Coriolanus*,

"This boy, that cannot tell" what he would have,
But kneels and holds up hands for fellowship,
Does reason his petition with more strength
Than thou hast to deny it.

Act 5. sc. 3.

In his comedy of *Errors*,

"Piteous plainings of the pretty babes,
That mourn'd for fashion", ignorant what to fear,
Forc'd em to seek delays for them and me.

Act 1. sc. 1.

As after some oration, fairly spoke
By a beloved prince, there doth appear
Among the buzzing, pleased multitude,
Where every something, being blent together,
Turns to a wild of nothing save of joy,
"Expressed and not expressed."

Merch. of Ven. act 3. sc. 2.

In this latter passage, though the incident is totally different, yet the idea and expression is almost the same as that of Euripides.

But to conclude this subject: the resemblance, peculiarities, and mutual assistance of the arts of poetry and painting, has been excellently well described

scribed in Mr. Harris's three *Dialogues on Art, &c.* and by the Abbé du Bos in his *Reflexions Critiques*.

Page 6. l. 24. *Merchants, upon more than one occasion, have told us, &c.*] See to this purpose the *Causes of the Decline of foreign Trade*, and Cary's *Essay on Trade*, and more modern works.

Ibid. l. 26. *The same incompetence has been insisted on in favour of ecclesiastical jurisdiction, in exclusion of the common Law.*] This is one of those small blots in the *Codex Juris Ecclesiastici*, which, with other errors of that learned and useful work, has been copied with less excuse by other writers.

Page 7. l. 9. *A passage in Xenophon, where Socrates recommends geometry and arithmetic as a general part of Education.*] The passage is this: Εδίδασκε δέ (Socrates Sc.) καὶ μέχρι οὗ δεοὶ ἑμπεῖρον εἶναι ἑκάστου πράγματός του ὀρθῶς πεπαιδευμένον. § 2.—Then, after considering geometry and astronomy, (§ 3. &c.) he comes to arithmetic, and subjoins the limitation to the study of each, alluded to in the text—ἐκτελευτῇ δὲ καὶ λογιστικῇ μάθαι καὶ τῶνδε ὁμοίως τοῖς ἄλλοις ἐκτελευτῇ φυλαττέσθαι τὴν μάταιον πραγμασίαν μέχρι δὲ τῆς ὠφελίμης πάντα καὶ αὐτὸς συνεπέσκαπεν καὶ συνδίδει τοῖς συνῶσι. Mem. lib. 4. c. 7. § 8.

Among many other * learned and ingenious publications, with which the Ladies of this age and country have obliged the world, this excellent work of Xenophon's has owed its naturalization in England to a female *Philosopher*; whose words I have here transcribed, as interpreters of her author's sentiments.

He was very careful to fix the bounds in every science, beyond which, he would say, no person properly instructed ought to pass—

* See for instance, the translation of Epictetus, the *Essay on the Writings and Genius of Shakespear*, *Life of Mons. D'Aubigné*, and *Letters on the Improvement of the Mind*.

Socrates also recommended the study of arithmetic to his friends, and assisted them, as was his custom, in tracing out the several parts of it, as far as might be useful; but here, as elsewhere, fixed bounds to their enquiries, never suffering them to run out into vain and trifling disquisitions, which could be of no advantage either to themselves or others. Mrs. Fielding's Translation, p. 350—353.

The admirers of Xenophon's account of Socrates that have not yet met with a small tract lately published *, will have great pleasure in seeing one of the most beautiful remains of antiquity set in a light, which had hitherto escaped every one who had published his sentiments on that excellent work: as the learned author of the small pamphlet, called the "Socratic System of Morals, as delivered in Xenophon's Memorabilia," in endeavouring to shew not only that there is a connection throughout the Memorabilia, but even that the parts arise out of each other, and have that regular dependence on each other that forms a system, has given the learned world an idea quite new and very plausible at least, if any one should think it not absolutely satisfactory.

Page 7. l. 25. *Geometry of general utility, &c.*] Two things deserve to be lightly touched on in this place. 1- The application of mathematics to the art of reasoning, in which view alone it can be of general use. 2. The false taste which some writers have fallen into, by a misapplication of this kind of learning to other subjects.

1. As to the application of geometry and algebra to the art of reasoning, Mr. Locke, in the passages alluded to, and throughout his Essay, is

* Printed for Rivington, the beginning of this year.

full enough in general; and a late treatise* of logic, that copies Mr. Locke's notions, and is the most liberal on that subject, has been rather more explicit in this particular.

The method of reasoning has been divided by logicians into the analytic and the synthetic. And as to the bare form of reasoning, algebra furnishes the most perfect model of the analytic, as geometry does of the synthetic; as is well known to every body conversant in treatises of that kind.

I will only add, that with a view to algebra as an art of reasoning, Professor Saunderson has, with uncommon perspicuity, done great justice to the subject; and has often given excellent specimens both of the analytic and synthetic methods together. See vol. I. p. 173. and 213. &c. And if we would look abroad for the application of these methods to other subjects than that of abstract quantity, Aristotle (even on the most liberal subjects, as poetry and rhetoric) may be recommended as a pure model of the synthetic or demonstrative method, as Xenophon and Plato, in their Socratic Dialogues, are of the method of investigation.

The reason why algebra deserves to be so much commended as the great art of extending our enquiries, (as geometry is of communicating them) seems to be from the variety and subtlety of its operations; the most considerable of which it may not be amiss to give a summary view of in this place. And such are, 1. Its transpositions. 2. Ingenious substitutions of known for unknown quantities. 3. Assumed equality of lines and symbolical quantities, whereby in the deeper operations an elegant simplicity and conciseness of expression

* By Mr. Duncan.

is obtained. 4. By adding or subtracting equations or ratios. 5. By the admirable facility its rules offer for comparing things together. 6. The independency of algebraical operations; whereas the propositions of Euclid (and all geometrical truths depending on them) are in a manner all chained together. The poet was happy in his idea when he said,

Full in the midst of Euclid dip at once,
And petrify a genius to a dunce.

Euclid is certainly one of those authors (in Seneca's phrase) in limine salutandus. 7th, and the last to be mentioned here, as a great spur to invention, and which are capable of being transferred to other enquiries, are the various means Algebra affords at coming at the same conclusions, by the union of its operations with those of Geometry. Of this Sir Isaac Newton, in his Universal Arithmetic, has given a beautiful instance, by deducing the same equation seven different ways. See the Latin edition, 8vo. p. 109—114.

So much for the real use of mathematical learning in cultivating, without cramping, the powers of the mind: but if instead of transfer the manner and perspicuity of geometrical reasoning to other subjects, other subjects are made to conform to this, the effect is inverted, and the faculties are confined instead of being enlarged. And therefore a few words must be added on the misapplication of this excellent science. 2. And excellent as it is, one is sorry to see the pedantic misapplication of the peculiar characters of Geometry and Algebra, that has prevailed with many writers on subjects totally different; whereby morality itself has been, in a manner put into masquerade:
and

and some of the first and clearest ideas in the mind of man have been involved in obscurity. This censure is the more necessary, because the very errors of some writers acquire a credit from their example; which it is much easier for the generality to copy than to distinguish where it ought or ought not to be copied. The dry forms of Propositions, Lemma's, Postulata, and the like, (which have been used in several instances) are of themselves disgusting in treatises of morality, even to the few who understand them in their proper places; but arguing from symbolical characters is surely much more so.

Page 7. l. 33.] The passage alluded to is in the conduct of the understanding § 6.

Page 8. l. 21.] Mr. Locke recommends the study of the first six books of Euclid. On Educat. § 171. Author of Analyst, viz. Bp. Berkeley.

Page 9. l. 11.] See Tully de Oratore.

Page 11. l. 19. *Finch has said.*] See Finch's Law, b. I. p. 6.

Page 11. l. 31. *The sage Littleton.*] The passage alluded to is in his Tenures, § 267.

Page 12. l. 3. *Good old writers, Briton and Bracton, &c.*] Lord Coke has cited the passages in his 1 Inst. 11. a.

Ibid. l. 12. *The exact similitude that, Lord Coke tells us, (from the Parliament Rolls) subsists between an elephant and a member of parliament, &c.* Lord Coke mentions this in his 4 Inst. 3. The Parliament Roll he cites in his margin is Roll 3. Hen. 6. No. 3. which may be seen at length in the Cotton Records, 577, pl. 3.

Swift, in the lively turn he has given this hint, has mentioned it as if Lord Coke himself was the author of the comparison.

“ 'Ere

“ 'Ere bribes convince you whom to chuse,
 The precepts of Lord Coke peruse;
 Observe an elephant, says he,
 And let, like him, your member be,” &c.

Vol. vi,

Page 13. l. 7. *The accounts of the antients less fabulous.*] Sir W. Temple, as the champion of the antients against the moderns, treats those accounts as literally true, which the antients themselves considered as allegorical. See vol. i. fol. edit. p. 162. Dr. Wallis, who was himself eminently skilled in music, and in the theory of it, both antient and modern, has left a curious enquiry, in the Philosophical Transactions, (No. 243. August, 1698.) why the effects of music are supposed to have been so much greater formerly than at this day; and upon his reasoning, and every day's experience, the remark of Eunomus is grounded. In further support of those observations, two instances may be added, both taken from very credible writers, of the extraordinary effect of music.

Henry Stephens, in his preface * to the edition of the Greek Poets, speaking of the story of Arion and the Dolphin, and other marvellous accounts left us by the antients in testimony of the power of music, adds an instance of his own knowledge. In the year 1550 he visited England, and during his stay there, gives an account of his going to see a Lion, which was esteemed remarkably large and fierce of the kind; mentions that a Boy being accidentally there with a Dutch organ played upon it, on which the Lion left his food, listened with

* Preface p. 8. The same story is materially inserted in Maittaire's Lives of the Stephens's, p. 216.

great

great attention, and turned himself round several times, as it were dancing; as soon as the organ stopped, he returned to his seat very eagerly, but the boy playing again he listened to the sound, and was as full of motion as before. After some days the experiment was tried again, and had the same effect. This is the substance of the story. I have added it, however, in his own words, for any one who has not the book by him.

“ Arioneus quidem certè Delphin notior est, quam ut eum hic commemorari necessè sit. Sed hæc omnia fando audita sunt tantum: hujus autem quam narrabo rei, testem me oculatum esse profiteor. Quum Londini agerem, animum Cupido incessit visendi Leonem, cujus omnes mihi Vastitatem prædicabant. Fortè accidit dum ejus unà cum aliis spectator essem, ut ingrederetur Juvenis organum quoddam circumferens. Is quum paulo post hortatu nostro (experiri enim libebat quàm verum esset quod de Leone ferebatur) pulsare illud cœpisset, repentè vastam illam belluam, relictis, quas avidè alioqui vorabat antea, carnibus, non modò attentam mulicorum sonorum auditricem esse, sed et in gyrum corpus circumagere, perque certos orbes ire ac redire, tanquam tripudiantem, non sine stupore conspeximus. Pulsare organum ille desinebat? ad carnes hic suas redibat. Ad pulsandum organum ille revertebatur? Missas carnes hic faciebat, suamque tripudiationem iterum incœptabat. Nec vero hoc tum aliquoties experiri fatis visum est; sed et aliquot post diebus eò reversi iterum experiri voluimus: et experti certè sumus, sed minore tamen cum admiratione, quòd tunc in vorandis carnibus occupatus minimè esset. Eant nunc qui ea quæ de Orphei lyrâ poetæ scripserunt, mera mendacia esse clamant.”

The

The other instance is of a surprizing effect of Music, on the human species, and even in Italy, where it is so universally familiar, and as it were of the growth of the Country, that it rather adds to the account. It is an extract from Sig. Tartini's *Trattato di Musica*, inserted in Mr. Stillingfleet's *Essay on the Principles and Power of Harmony*. "In the year 1714 (If I am not mistaken) in an Opera that was performed at Ancona, there was in the beginning of the third act, a passage of recitative, unaccompanied by any other instrument but the base: which raised both in the Professors and in the rest of the audience, such and so great a commotion of mind, that we could not help staring at one another, on account of the visible change of colour that was caused in every ones countenance. The effect was not of the plaintive kind: I remember well that the words expressed indignation; but of so harsh and chilling a nature that the mind was disordered* by it. Thirteen times this drama was performed, and the same effect always followed, and that too universally; of which the remarkable previous silence of the audience, to prepare themselves for the enjoyment of the effect, was an undoubted sign." Stillingfleet, p. 62.

Page 14. l. 13. *Many of the antient laws of Greece are preserved in both his poems.*] The Grecian antiquities of Archbishop Potter, Meursius, and Petit's *Leges Atticæ*, are full proofs of this; and see an ingenious dissertation to this purpose in Gronovius, *Collection of Greek Antiquities*, vol. vi.

* This was, in effect, a species of that *Anti-Music*, which Lord Bacon had long before conceived as a very practicable invention.

Page 14. l. 25. *Appeal to the many eminent writers of natural and civil law.*] One may in this case appeal to the Roman Emperor himself, who has quoted Homer in his Institute; as the compilers of the Digest had done before him. See particularly Inst. 2. tit. 7. on the Donatio Causâ Mortis, and the Digest, lib. 1. tit. 1. § 1.

Page 16. l. 12.) Odyss. l. 2.

Their Manners noted, and their States surveyed.

Pope, v. 6.

Ibid. l. 20. *Must be qualified to improve by travel,*] Dr. Middleton's remark on Tully to this purpose is very fine. See his Life of Cicero, Vol. i. 4to. edit. p. 45, 46.

Page 17. l. 12. *The orators of Greece and Rome are qualified as well as the poets to entertain in their turn; the poets, we are told, were their fathers.*] Alluding to a passage in Strabo, well worth transcribing.

Ὡς δ' εἰπὺν ὁ πεζὸς λόγος οὐκ ἀποσκευασμένος μιμηματῶν ποιητικῶν
ἔστιν· πρωτίστα γὰρ ἡ ποιητικὴ κατεσκευασμένη παρῆλθεν εἰς τὸ μέσον, καὶ
ὑποκίμηνεν. εἰς αὐτὴν μιμημένοι, λυσάντες τὸ μέτρον, τ' ἄλλα δὲ φυλατάντες
τὰ ποιητικὰ, συνέγραψαν οἱ περὶ Κάδμον καὶ Φερεκύδην, καὶ Ἑκείαιον. οὕτω οἱ
ὑπερὶ ἀφαιρέσεις αὐτῶν τοιγάρ, εἰς τὸ νῦν εἶδος ἀπὸ καὶ ἡγήγον, ὥς ἀπο ὑφ' ὅς
τινος.

Edit. Casaub. lib. 1. p. 18.

*For, if I may so express myself, prose composition, where the diction is studied, is an imitation of poetry; for poetic ornaments appeared first in the world, and met with approbation: in imitation of which, writers in succeeding * times, were induced to drop the metre in their*

* Casaubon, and other editors of Strabo, translate the original "οἱ περὶ Κάδμον, &c." simply Cadmus, Pherecydes, &c. and there are many instances in the best authors, where the word *περὶ*, contrary

their compositions, but at the same time to preserve other poetic ornaments. And at length, those who came last, by continually subtracting something, brought it down to what we now see it, from its original elevation.

This historical conjecture of Strabo may serve as a basis for the observation in the Introductory Essay, p. 13. and is alluded to in the second Dialogue, where poetry is said "to have been the original form of all writing." Page 54.

Page 17. l. 29. *Who is there, though he knows them to be fictions, though in the severe eye of criticism they are so many violations of historical truth.*] This is Mr. Voltaire's opinion, who insists upon it such fictions are excusable only in writers of antiquity. "Les harangues sont une autre espece de mensonge oratoire, que les historiens se sont permis autrefois. On faisait dire a ses heros se qu'ils auraient pû dire. Cette liberté surtout pouvait se prendre avec un personnage d'un tems éloigné: mais aujourd'hui ces fictions ne sont plus tolérées." Preface to Hist. Russ. p. 38. And it may be remarked, Lord Lyttleton, whose example and authority will always have great weight, has not given this fiction a greater latitude, in his admission of them into the History of Hen. II. because his hero, with respect to our days, is *d'un tems éloigné*. And on this principle he seems to vindicate them. Notes, Vol. i. p. 522. to the History, Vol.

ary to the general import of the term, means the person himself connected with the preposition; as *οι περι Σωκρατην, οι περι Αλεξανδρον*, are used to denote Socrates and Alexander: but even in these instances, I take it, the word *περι* always implies something more; that is, as we may say, Socrates and those about him, or Alexander and those about him, viz. the scholars of the one, the soldiers or attendants of the other. All which seems evident from the instances of this use of the word, collected by H. Stephens, in his Greek Thesaurus, voce *περι* cum accusativo. However, precision not being so necessary on the present occasion, the general manner of translating the passage above seemed sufficient.

i. p. 398. And from very rude materials, authentic however in point of foundation, has work'd up some animated pieces both of military and civil eloquence.

Page 21. l. 16. *Appeal to the present, viz.)* The year 1767, when the dialogue was written.

Page 22. l. 25. *The figure they have made in the senate.]* Always except in 6 Hen. VI. when lawyers were expressly excluded; and that period, we know, is characterised by the name of "Indocum Parliamentum." See 4 Inst. 48. Mr. Hume, indeed, says, "Lawyers were totally excluded the house during several parliaments, in Edward the Third's time;" and cites Cotton's Abridgment, p. 18. but the page cited does not warrant the assertion, there being some mistake in the figures. Hume's Hist. Vol. II. p. 233, 4to.

Page 23. l. 24. *Histories of Hen. VII. and the civil war.]* At the time of writing the Dialogue, these great works were singled out, if not as models, yet as the best specimens we have of English history, and the voice of the world seemed then to be in their favour. A passage, however, from a work since published, will shew it is not an universal opinion——

"Let me lament that two of the greatest men in our annals have prostituted their admirable pens, the one to blacken a great prince, the other to varnish a pitiful tyrant. I mean the two Chancellors, Sir Thomas More and Lord Bacon. It is unfortunate that another great chancellor should have written a history with the same propensity to misrepresentation, I mean Lord Clarendon. It is hoped no more Chancellors will write our story, till they can divest themselves of that habit of their profession, apologizing for a bad cause."—It is hoped, however, no more writers, who may chuse to publish their
historic

historic dotings, will think they alone have force enough to shake the long-established opinion of the world on the merit of the greatest authors; at least, when they are thus deciding on the works of the Writer, they will spare themselves the trouble of going out of the way to abuse his *Profession*, with which and the work in question there does not seem to be any kind of connection!

Page 25. l. 3. *Kill him first, and then, after the manner of the Egyptians, scrutinize his conduct.*] See a law to this purpose in Diodorus Siculus.

Page 26. l. 14. *Compare similar events.*] With this view writers of the most liberal turn have now and then disregarded even large anticipations in chronology, in order to instruct the better, by comparing similar characters, actions, or manners, of different ages.—As in the reign of Hen. II. Vol. i. p. 289, 421. and Vol. ii. p. 162, 246, 284, 339. This liberty is very frequently to be met with in the Memoirs of Brandenbourg, and Voltaire's *Esfai sur l'Histoire*.

Page 26. l. 28. *The practice of different nations, in points that are indifferent in themselves, and not of natural obligation, have been considered as the law of nations.*] Bynkerhoek, a very sensible writer, in his *Jus Publicum*, attends much to this distinction.

Page 27. l. 8. *The number of examples in History, will not create Law in this respect, and this difference must be attended to, or History will mislead Reason by false colours.*] This subject has been considered in a more general view by a celebrated French writer, the Chancellor d'Aguesseau, whose observations, it is hoped, will not be thought improperly cited here, pretty much at length, being on a very interesting point, forcibly expressed, and taken from a work comparatively in very few hands. Concluding

cluding his instructions to his son on the study of history, he says—" Vous êtes a portee par ces reflexions generales de connoître les avantages d'une etude si neccessaire, et j'espere que vous en eviterez de vous meme les inconveniens. Vous les sentirez aisement pour peu que vous frequentiez ceux qui se sont tellement attaches a cette etude, qu'ils ont neglige toutes les autres. Ils tombent dans un excès directement oppose a celui des esprits qui ne font cas que de la Philosophie. Ceux-ci veulent juger de ce qui s'est fait, par ce que doit se faire ; et ceux--la veulent toujours decider de ce que doit se faire par ce que se fait. Les uns sont, si je l'ose dire, la dupe des raisonnemens, et les autres le sont des faits qu'ils prennent pour la raison meme. Leur esprit devient tellement historique, qu'ils ne sont presque plus capables de raisonner par principes. S'agit-il de former un jugement, ils racontent un fait, et au lieu de la decision que vous leur demandez, ils vous donnent une Histoire et souvent un Conte ; ensorte que contents de pouvoir repeter beaucoup de faits, et ne travaillant qu'a enrichir leur memoire, ils semblent n'être plus que des Dictionnaires animés, et des Repertoires parlans.

" Comme il n'y a presque point des matiere sur laquelle on ne trouve des faits ou des exemples contraires, et qu'ils negligent l'etude des principes qui apprennent l'usage qu'on doit en faire ; il ne resulte souvent de tout leur scavoir, qu'une confusion et une indecision universelle, parce que les faits se combattent, pour ainsi dire, dans leur tête, ou ils ne produisent que des doutes, et ne forment que des nuages.

" Enfin, si le Ciel leur a fait le dangereux present d'une trop heureuse memoire, c'est un miroir où tout se peint en detail, et jusque aux

„ moindres objets. Le superflu et le frivole prennent la place de l'essentiel et du solide, ou du moins le chargent et l'offusquent tellement, qu'il faut traverser une mer de bagatelles, pour arriver jusqu'à la terre ferme.

“ — Les principes que vous avez déjà imprimés dans votre esprit, mon cher Fils, et ceux que vous y ajouterez dans la suite, me font espérer que vous ne tomberez pas dans ces défauts : vous ne séparerez point deux choses qui doivent toujours marcher de concert, et se prêter un secours mutuel *la Raison et l'Exemple*. Vous éviterez également et le mépris des Philosophes pour la Science des faits, et le dégoût ou l'incapacité que ceux qui ne s'attachent qu'aux faits contractent souvent pour tout ce qui est de pur raisonnement. Ainsi, pour finir par où j'ai commencé, sachant réunir et vous approprier les avantages de deux Sciences également nécessaires à l'homme public, la vraie et solide Philosophie dirigera chez vous l'étude de l'Histoire, et l'étude de l'Histoire perfectionnera la Philosophie.”

Oeuvres d'Aguesseau, tom. i. p. 340.

Page 27. l. 13. *Natural connection between law and fact.*] This connection, to those that trace it in the mind, will be always found to form a complete syllogism. And the syllogistic process of a man's own conscience, as well as that of human judicatures, the sentence of both being no other than that conclusion which the mind must draw from a comparison of the general rule, (that is, either the dictates of natural reason, the laws of society, or express positive revelation) with the action or case supposed, is insisted on by many excellent writers; and indeed affords the finest theory of religious and moral duty, as well as of political justice. In this view see Dr. South's Sermons, Vol. II.

Vol. II. p. 492. Heineccius de Jure Nat. et Gentium, lib. i. c. 2. § 34. Burlamaqui, partie second c. 2. § 2. And the Third Commentary on the Laws of England, p. 396. The present Czarina has treated this in the same manner, Instruēt. pour le code de la Russie, Art. 10. par. 142. and the Marquis de Beccaria, c. 4, p. 14. whom indeed the Empress evidently copies, because they both concur in the singular notion of taking from the Judge the power of interpreting Criminal Laws, notwithstanding his decision on those Laws implies it: for how can he draw that conclusion which is the result of the comparison of the Law with the Fact, if he does not know the precise meaning of the Law itself? How, in words, can he conclude without premisses; for when the Law is in doubt, the major proposition of the Syllogism is evidently defective? If indeed the Prince is to explain Law by a new one in every instance, what kind of fence will such Laws be?

Page 27. l. 36. *The annales pontificum the early form of history.*] Mentioned in the same passage in Tully de Oratore, as the passage above cited.

Page 29. l. 26. *The little finger of the law was heavier than the loins of the prerogative.*] Alluding to a remarkable and fatal saying of Lord Strafford's, taken notice of in Lord Clarendon's History, Book II. p. 174, Oxford edition.

Page 29. l. 35. *That the Laws of England are the King's Laws, &c.*] See the printed argument, and the Chief J. (Sir Ed. Herbert's) opinion in Godwin v. Hales. Trin. 2. Ja. p. 11. And State Trials, Vol. vii. fol. 616. In what sense they may be called so, see Dial. 3. p. 129.

Page 30. l. 15. *Of opinion that it is treason in a parliament to proceed on any business contrary to what the King may appoint.*] See Mr. J. Foster's Discourses,

courses, p. 395, 396. where the whole proceeding is considered.

Page 30. l. 33. *And yet this every man, says a very honest and learned Judge, &c.*] J. Foster. See the case itself alluded to in the Dialogue, reported in Dyer 100, and Foster refuting Dyer, Disc. 234.

Page 31. l. 3. *Setting one Judge to tamper with all the rest.*] See many instances of this tampering, Foster, *ibid.* 200. To which may be added, the remarkable *case of the ship-money*, in which Lord Keeper Finch tampered with all the Judges. See for this purpose Rushworth's Collec. part 3. p. 87. Lord Falkland's Speech on it, and the Vote, *Ibid.* 129.

Nor was this tampering with Judges, however unconstitutional, at all inconsistent with the principles of some reigns. It is no hard opinion, because it is a conclusion from facts, to say that the prerogative has, in distant times, been more regarded than the rights of the subject, even in the very choice and appointment of Judges; witness Lord Bacon's Letters, lately published by Dr. Birch, p. 42, 44, 97, 103.

That collection shews likewise, that it was a common practice for noblemen in that age to write to a Chancellor, during a cause depending, in recommendation of one of the parties; which practice was doubtless such an attack on the impartiality of justice, that an age of more freedom in other respects would blush at; a singular example indeed of Tully's observation—*non erubescit Epistola!* In these letters however was usually inserted a colourable restriction to the request, “to grant “as much favour as the justness of the cause “would permit;” which no doubt was understood by the writer to be as much a word of course, as the clause of equity every suitor puts into his own bill

bill. And yet the practice appeared so defensible at that time, that Lord Bacon, even after his disgrace, fell into it as others did. See the above letters, p. 168, 173, 377, &c. &c. I omit other corruptions in Judicial proceedings, more gross and glaring than these, in the same collection, even without a reference; because I have no pleasure in dwelling on circumstances that so much degrade the dignity of human nature; and the only comfort that can ever arise in contemplating such instances, even at this distance, is, that the present times are in this respect the strongest contrast to the former.

Page 31. l. 18. *To the immortal honour of our present Sovereign.*] See the Act 1 Geo. 3. c. 23. And more to his honour; because it seems a bill of this kind was offered in the year 1692, and refused the royal assent. 2. Burnet Hist. 86. to which possibly Addison alludes as a measure then in agitation, Guardian, No. 99. though I rather consider that passage as it may be explained from the anecdote preserved by Lord Raymond, vol. ii. 768.

Page 31. l. 31. *What Chief Justice Vaughan said.*] So said in the case of Harrison and Dr. Burwell. 2 Ventr. 10.

Page 33. l. 7. *The trial of a private recusant.*] Sir J. Hale's coachman in King James 2. time; of which the Histories and Law-books are full.

Page 34. l. 7. *Self-defence must subsist in those cases, where the laws of the community cannot be appealed to.*] Alluding to the true distinction in the well-known passage of Tully pro Milone. On this principle our law allows persons to abate nuisances; so cases of necessity; as pulling down houses to stop fire; killing fugitive felons. 2. Hale, 77. And in regard to personal defence, it may be observed, the
plea

plea of *son assault demefne* (as it is called) in actions, is grounded on this great law of nature. The same will in evidence acquit or excuse in all cases on indictments; but then (as it has been supposed all along) the necessity of the self-defence must appear in all cases of that nature: for no man is to take his own remedy, where the law can be applied to.

To the universality however of this doctrine, one exception it seems must be understood, if indeed it is true, that a person who is "struck in a church-yard cannot justify striking again in his own defence."

It is indeed so laid down by Hawkins, 1 Pl. Coron. 139. and he cites Cro. Ja. 367. as his authority. The opinion itself, however copied from one book into another, is enough to startle every body: and it is but justice to a point of such importance to consider it minutely.

And if the opinion stands upon that authority, it will, I apprehend, deserve very little weight, for the following reasons:

1. Because that book, in the place cited by Hawkins, contains only a string of resolutions, without so much as one circumstance of fact being reported in the case, to shew what points were before the court; and consequently to discover, whether this point was or was not extrajudicially determined? Noy, indeed, though not cited by Hawkins, seems to report the same case; (Noy, 104) at least the points resolved are the same, though the name of the case is different. It does not however appear, even from his state of it, that "the fact at all led to the determination." It was, according to Noy, a Bill in the Star-chamber for pulling down of painted glass, pictures, and arms in a window, in an isle of a chapel in Somersetshire. And this reporter

reporter is more particular than J. Crook, as to the resolution of this point. "A man may not beat another, or draw a weapon there, although it be in his own defence; for it is a sanctified place, and he may be punished for that by the Stat. of 2 Ed. 6. And so, if in any of the King's courts, or within view of the courts of justice: because a force in that case is not justifiable, though in his own defence."—Now it may be observed from this state of the resolution, 1. That the fact "of beating in his own defence," from this state of it, does not appear to have been before the court; rather the contrary; for it says only "he may be punished by the statute," and therefore the statute was hardly then before the court. 2. It is compared to "striking in courts of justice, or within view of the courts." Now I do not find, upon looking into the books, that it had been ever held at or before that time, that self-defence in this latter case was not justifiable. In Trin 15. Car. 2. Justice Twisden held (not improbably from this notion in Noy) that the party struck could not justify striking again. 1 Lev. 106. The authority of that case is (I own) stronger: because the fact arose in the case: but even in that case, the opinion was premature, though not extrajudicial; because it was so said by the judge at the time of the defendant's entering into the recognizance; now it could be material only at the time of the trial. According to the report, the defendant was convicted at his trial; but whether self-defence was set up in excuse, or whether it was then over-ruled by all the judges at the bar, does not appear.

But allowing this case all the authority any case need have, surely striking in a church-yard is very different in its circumstances from striking in view
of

of the courts; especially as the courts then were unenclosed and more open to view: and consequently the reasoning from one to the other by no means just. One is in the church-yard *generally* without restraining it to time of divine service; where the insult and indecency would be greatest, and the necessity of self-defence (which alone is to excuse it at any time) would be the least: because there might be people enough present to seize the affrayer. The penalty of striking in Westminster-Hall, or in view of the courts, is restrained "to the courts sitting*," where perhaps self-defence may be less necessary than in any case whatever; because the party offending may be immediately seized and carried to justice, as the fact was in the case, 1 Lev. 106. But what chance may the party have for his life in a solitary country church-yard?

2. Because his opinion (not being supported by the case cited) will have very little weight in itself: because the words of the act 5 & 6 Ed. 6. c. 4. creating the offence, are not strong enough to repeat a primary law of nature, as self-defence is; and it is contrary to the general tenor of constructions to repeal common law by any act that is affirmative only.

3. Because such an opinion may be attended with consequences the law would never endure.—A man (if this opinion holds) must even submit to be murdered in a church-yard, when a slight resistance on his side might have saved his life: and for want of self-defence in such a case, two lives in the end must be sacrificed, where both might have been preserved.

I could not help adding such reflections as occurred to me, upon looking into the original au-

* Cro. Car. 373. Sir William Waller's Case.

thority on which the opinion is grounded; because the opinion, untenable as it seems to be, has crept into many books of credit; and may acquire an authority in being echoed by each subsequent writer, however weak and sandy the foundation may be on which it originally rests. It has made its way from Hawkins into Watson, and other subsequent writers.

Page 34. l. 21. *On this principle Mr. Locke vindicated the Revolution.*] See his Book on Government, sections 151, 155, 209, 210.

Page 35. l. 14. *To use the expression of a great advocate for civil liberty.* See Foster's Disc. 404. and the Remarks on English History, letter 20.

Ibid. l. 16. *Addison.*] Spect. Vol. vi. No. 403.

Page 36. l. 1. *Many writers rank the piratic states of Barbary.*] See Molloy de Jure Marit. 53. 136, 7. and this question more humanely determined in Bynkershoek. Jus Public. 121. b. 1. c. 17.

Ibid. l. 2. *Mr. Locke does all absolute monarchy.*] On Government, sect. 90.

Page 37. l. 10. *Bracton, who was a doctor of both laws.*] Foster's Disc. p. 132. and Spelman's Remains, 99.

Page 37. l. 15. *The attempts of Cowell.*] Both houses concurred in a resolution to censure Dr. Cowell's other book, written in 1609, called "The Interpreter," as containing many heads derogatory from the Parliament and the Constitution: but the King promising to take the matter up, their proceedings dropped. See Journ. Dom. Proc. et Com. 7 Ja. cited Petyt's Miscell. Parliamentaria, p. 64. Lord Coke's observation in his Preface to the 10th Report, will serve to all such books. The titles censured were *Subsidy, Parliament, King, Prohibition, &c.* See the printed Journals of the Commons, Friday 23 Feb. 1609, Vol. i. p. 399. The edition of Cowell's Interpreter in

4to- of 1637, is accordingly considerably purged, but will be found to have errors enough left to discredit it as a constitutional authority.

Ibid. l. 22. *That King preferred the Civil, &c.]* In Wilson's Hist. of King James, 46, 47.

Page 37. l. 31. *Lord Bacon proposed.]* See his proposals printed in all the editions of his works.

Page 38. l. 1. *Civil Law however deserves to be studied.]* It is scarce possible to mention a more constitutional lawyer than Lord Chief Justice Hale; and his opinion of the civil law may be seen in Bp. Burnet's Life of him, page 24.

Ibid. l. 9. *Agrees with the Civil Law in many particulars.]* It was thought unnecessary to cite passages even here; as books of authority, both in our own and the civil law, may easily be turned to, in support of what is said in the Dialogue. In particular, Wood's Institute of the Civil Law, and above all, the Commentaries on the Law of England, will on this point give the curious enquirer the satisfaction he desires.

Ibid. l. 19. *The difference of the two systems in similar objects.]* In this place it may not be amiss to be a little particular, because the track is new and not without its convenience. Many Cases might be collected from our Law books, where our courts have followed the civil law: and many where they expressly differ. Some of both which are here referred to.

1. Cases where the civil law was followed, as 1 Peer Will. 10. Ibid. 267. Ibid. 304. Ibid. 405, 6, Ibid. 441, 442. 2 Tr. Atkins, 115. 3 Tr. Atk. 364. S. C. Wilson, 135. Comyns, 738. 1. Vezey, 86, 107, &c. &c.

2. Cases where they expressly differ. 2. Peer Will. 142, 143, 348, (529) 442, 528, 530, (628) 667.

667, 682. 2 Hawk. P. C. 13. § 10. 1 Strange, 80. 2 Strange, 1255. 2 Vezey, 517, &c. &c.

Page 38. l. 33. *Extraordinary refinement.*] This extraordinary law is to be met with in the Code, l. 5. tit. 3. law. 16.

Page 39. l. 5. *Not altogether a stranger to the Roman law.*] Sir H. Spelman, in his corrected copy of the Treatise on Terms, has omitted a strong assertion to the contrary, contained in his first copy, published separately, 1684, and so indeed has Fortescue, lib. 1. c. 17.

Ibid. l. 18. *Discovery of part of it.*] Juinian's Pandects at Amalfia, in the territory of Naples. See Giannoni Istoria Civile di Napoli, tom. 2. lib. 11. c. 2. Spelman, Duck de usu, &c. and other writers.

Ibid. l. 30. *Sir Hen, Spelman will tell you.*] Reliq. edit. Gibson, 89, 98.

Page 40. l. 1. *Lord Vaughan.*] Who is reported to have said so. 2 Ventris, 11.

Ibid. l. 6. *Many questions.*] Alluding to numbers of questions well known in our law books; most of which are recognized in the argument and resolution of Robinson and Bland, reported by Sir James Burrows.

Ibid. l. 33. *An English Lawyer has his Lombard School.*] Besides what our own writers have said on the Law of Lombardy, many particulars are to be met with in Giannoni's Istoria civile di Napoli, tom. 1. lib. 5. c. 5.

Page 41. l. 5. *Learned and unexceptionable Witnesses.*] By the names of Spelman, Hale, Wright, and particularly the Author of the Commentaries.

Ibid. l. 15. *Invasions, most of them productive of laws.*] Spelm. Reliq. 100. Fortesc. 17. and Bacon's proposals for a Digest.

Ibid.

Ibid. l. 23. *Political maxims of other States adopted.*) The Legislature itself has, in one memorable instance, built its preamble on the observations of our nobility who *have travelled*. 36. Ed. 3. c. 15. "In divers regions and countries, where the King, the nobles, and other of the said realm, have been, good government and full right is done to every person, because that their laws and customs be learned, and used the tongue of the country," &c.

Page 42. l. 26. *Helen of Zeuxis.*) Mentioned in Tully's book, called Orator, c. 6. See the same allusion Xen. Memorab. lib. 3. c. 10. § 2.

Page 43. l. 4. *Sex horas somno of your master Coke.*) Alluding to Lord Coke's advice to the student, in his Comment on Littleton. Co. Litt. 64. b.

Page 43. l. 11. Homer, Iliad 2. v. 24.

"No Counsellor must waste whole nights in sleep."

Is the sense in a single line; Mr. Pope has paraphrased it.

N O T E S

O N

D I A L O G U E II.

PAGE 47. l. 15. *Olive grove of Academe.*] Alluding to Milton's *Paradise Regained*, b. 4. v. 244.

Ibid. l. 21. *Even by a friend of Plato's.*] Cic de Oratore, lib. 1. c. 7. and in the introduct. to his Book de Legibus, lib. 1.

Page 49. l. 23, *As Virgil's Fame.*] See Æn. III. v. 128. Tot vigiles oculi, &c.

Ibid. l. 24. *Different languages our laws are composed in.*] See, among others, Preface to Sir J. Davis's Report, fol. 6, 7. and see Preface to 3d Report.

Page 52. l. 12. *Latin language employed by all civilized nations in law proceedings.*] See Duck de uf. Jur. Civilis, lib. 2. c. 1. p. 110, 111.

Page 54. l. 13. *Not only records, but charters and wills have been written in verse, &c.*] See the Record of the lawless court in Camden's *Britannia*, edit. Gibb. 341. but more fully in Cowell's *Interpreter*, voce "Lawless court." And a record of the Exchequer, Camd. Brit. 344. in Easter. 2 Anno. 17 Will. 1. See the grant to the Hopton's Blount's Tenures, 102. Various customs of manors in verse. And see 2 Lord Lytt. Hist. 321. and 3 vol. 12. Ibid. 144, 162. And for wills, besides

besides Saxon instances, there is a late and very remarkable one of Mr. Hedges, entered in the Commons in 1737, which is as follows.

THE fifth day of May
 Being airy and gay
 And to hÿp not inclin'd
 But of vigorous mind
 And my body in health
 I'll dispose of my wealth
 And all I'm to leave
 On this side the grave
 To some one or other
 And I think to my brother
 Because I foresaw
 That my breth'ren in law
 If I did not take care
 Would come in for their share
 Which I no wise intended
 Till their manners are mended
 And of that God knows there's no sign
 I do therefore injoin
 And do strictly command
 Of which witness my hand
 That nought I have got
 Be brought into hotch-pot
 But I give and devise
 As much as in me lies
 To the son of my mother
 My own dear brother
 To have and to hold
 All my silver and gold
 As the affectionate pledges
 Of his brother JOHN HEDGES.

The testator died in 1735. This extraordinary will passed a very considerable personal estate ; and
 may

may be seen, verbatim as above, in the Register, at the Prerogative Office: where it appears, that administration, with the will annexed, was granted to Paul Whichcote, Esq; and another.

Page 54. l. 14. *Embassies have been delivered in verse.*] And in Latin verse too; witness that of Philip the second of Spain, and Queen Elizabeth's very spirited extempore reply.

*Te veto ne pergas bello defendere Belgas :
Quæ Dracus eripuit, nunc restituantur oportet
Quæ Pater evertit, jubeo te condere cellas :
Religio Papæ fac restitatur ad unguem.*

To which it is said the Queen instantly answered,

Ad Græcas, bone Rex, fient mandata Calendas.

See Catal. of Royal authors; vol. i. p. 38.

Page 54. l. 20. *Aristotle tells you.*] In his Problems, § 19. Probl. 28. and Hor. Art. Poet. v. 399. And Stanyan's Grecian Hist. Vol. i. p. 29.

Ibid. l. 22. *Tacitus.*] De Mor. Germ. § 2.

Page 55. l. 14. *Noble regulation of our societies.*] See the order of the Inns of Court in Trinity Term, 1762.

Ibid. l. 16. *Inns of court have been stiled universities.*] By Fortescue, in his Laud. Legum. Angliæ, and the Preface to Lord Coke's 3d Report.

Page 56. l. 19. *Sir Thomas More's question.*) See the Life of Sir Thomas More, by his great Grandson (Hearne's Collection) cap. 3. and the other Lives of him, by Dr. Stapleton and Hoddesden.

Page 57. l. 14. *Lord Coke's expression.*) In his preface to the first Institute.

Page 58. l. 11. *What we have done as to printing and music from Italy.*) See Mr. Harris's Hermes, page 408, &c.

Ibid.

Ibid. l. 20. *As Sir W. Temple observes.*] Scil. Introduction to the History of England, Vol. i. fol. 530.

Ibid. l. 28. *Roman law.*] See Dr. Taylor's Elements of the Civil Law, and Duck de usu Juris Civil. lib. 2. p. 107—109.

Page 59. l. 16. *Contributed to have fixed the language.*] See Swift's Letter to Lord Oxford, Vol. iii. edit. Hawkefworth, p. 337.

Page 60. l. 10. *A great part of the lands in possession of the church.*] See Lord Coke's 2 Instit. page 3. and Sir W. Temp. Introduct. to the Hist. of England; and see note to page 86. line 13.

Ibid. l. 24. *The conqueror used the utmost zeal to propagate the Norman tongue.*] See Sir W. Temp. Introduct. page 238, 241, 244. 8vo. edition; and Fortescue de Laud. Leg. Angl. c. 48. Lord Hale's Hist. of the Com. Law, c. 5. And see Observations on the Antient Statutes, second edit. p. 46. 209. And Lord Lyttl. Vol ii. p. 320. who has shewed that even in the reign of Edward the Confessor, French was spoken by most of the English nobility; and the Norman forms were used in legal proceedings.

Ibid. l. 32. *From the time of Edw. III.*] See Preface to the third Report, and Lord Hale's Hist. Common Law.

Page 61. l. 6. *An ordinance well considered at the time.*) See Sir B. Whitlock's Speech in his Memoirs, p. 460.

Page 62. l. 1, and the following. *Homo stands for a woman, &c.*) *Homo*, as a term descriptive of the genus or species, necessarily includes females: and in that sense it is applied in 2 Peer Will. 357, and other cases: and indeed by all writers whatever, as well as in common language. But I believe it is very uncommon to find it applied to a female,

female, spoken of as an individual. One instance, however, occurs in the celebrated Letter of Sulpicius to Tully, on the loss of his daughter—"pau-
 "cis post annis ei tamen moriendum fuit, quoniam
 "Homo nata fuit"—speaking of Tullia, lib. 4. epist. 17.

Mulier is applied in our law books for a child (of whatever sex) born in lawful wedlock; whence the common distinction—Bastard eigne and *Mulier* puisne. 1 Inst. 244, and 1 Roll. Abrid. 624. and *καρθιστοι* in a high sense is once used in scripture to denote men in a state of extreme purity and innocence. Rev. xiv. 4.

* Persons to be born, to mean those already born, as 1 Will. 426. Persons living, to mean those not born, 1 Will. 342. King for Queen, as in all acts of parliament. One particle for another, in many cases in Peer Williams.

Page 62. l. 10. *Patriarch of Venice did by a word of Aristotle's.* See Bayle's Dict. voce "Barbaro."

Ibid. l. 17. *St. Evona, a famous Lawyer of this country.* The story here dressed up is told in substance in a small book, published in 1691, called a Description of the Netherlands, p. 58.

Page 64. l. 27. and the following page.) The popular objection to this part of the Law, is put by way of parody on the form itself, and p. 76. the objection is taken from the common well known language of the particular forms alluded to.

Page 65. l. 26. *Lord Coke one of its ablest advocates.* He often argues from the "usual pleading," which, he says, is the *sure oracle* of law, 2 Co. 68. a. Ibid. 54, a. 3 Co. 9, a. Ibid. 27. a. and calls good pleading the *Lapis Lydius*, or Touchstone of the true Sense and Knowledge of the Common Law, 10 Co. 29. b.

Ibid. l. 28. *Lord Coke often censures impertinent pleading.*] And Lord Hale. Hist. Com. Law. 173, &c.

Ibid. l. 31. *An address in parliament against special pleading itself.*) In 3 Geo. II. See the Journals of the House of Commons, 11 Feb. 1730. and 13 Feb. afterwards, the same session.

Page 66. l. 19. *In the Turkish dominions.*) See instances in Maundrel's and Norden's Travels.

Page 66. l. 22. *Elaborate forms among the Greeks and Romans.*) See Brissonius, and the authors collected by Grævius and Gronovius. The passage from Tully, cited as the motto to this dialogue, would alone be a proof of the use the latter made of forms, if there were no remains of the forms themselves.

Ibid. l. last. *The nature of the certainty the law requires.*) Besides what is said in particular in the note to p. 45, &c. the several kinds of legal certainty, and how far the want of them may, or may not, be supplied by judicial construction, are laid down, 5 Co. 121. a. and 8 Co. 57. a. Ibid. 159. a.

Page 67. l. 4. *Law requires less exactness in a will.* See 6 Co. 64. b.

Ibid. l. 24. *Deeds that are informal.*] See the opinion of Ch. J. Holt, and Mr. J. Powel. 1 Will. 76, &c.

Page 67. l. 26. *Will not permit trifling exceptions to avoid deeds.*] See 1 Will. 149. and 10 Co. 126. a. Ibid. 133. a.

Page 68. l. 6. *Lord Coke has told us, &c.*) See 6 Co. 66, 67. a. and 5 Co. 38. b.

Page 69. l. 27. *Leibnitz, who would have deduced.*) See Mr. Locke's Conduct of the Understanding, and his Essay, b. IV. c. 7. § 11.

Page 71. l. 3. *In Prior's language.*) In his Alma,
i Canto, ad finem.

Ibid. l. 20. *Jamaica or any other part of the world said in a declaration to be in Middlesex.*) See to this point Co. Litt. 261. Latch 4, 5. 2. Keb. 315. 2 Salk. 657. S. C. 6. Mod. 194. Ibid. 228.

Ibid. l. 24. *Incurring præmunires.*) This expression, though in frequent use, is of so dark and remote an application, that it deserves a few words by way of explanation in this place. At this day "*incurring a præmunire*," is a figurative expression; and means that a person guilty of any particular offence, that the law now deems a præmunire, shall suffer the same pains and penalties that persons under a præmunire (as it is corruptly called for præmoneri) formerly did: though the offence itself, properly speaking, of setting up, in particular instances, the *papal* power against the jurisdiction of the realm, after having been warned against it by writ, (which constituted the original offence) has scarcely in fact existed since the Reformation. A like figurative expression occurs in Tully de legibus, lib. 2. c. 9. where in laying down an imaginary plan of laws for religion, he says, any one who commits *sacrilege*, shall be deemed a *parricide*.—"Sacrum sacrove commendatum, qui clepserit rapsitque, *parricida* esto:" that is, shall be treated like a parricide.

Many as remote applications of legal (and perhaps of other) terms may be met with in antient writers; of which kind a remarkable one seems to occur in St. John's gospel, c. viii. v. 4. λεγεν αυτω, Διδασκαλε, αυτη η γυνη κατηληφθη ΕΠΑΥΤΟΦΩΡΩ μοιχευομενη, which, literally translated, is, "this woman was caught in the *very theft*, committing adultery:" but as to the sense and meaning of the passage, it

is very well rendered in the common translation, "was taken in adultery in the very act." It is clear, however, this application of the term *επαυτοφώρῳ*, is remote and by analogy. For, 1. it properly signifies the taking a person in the act of *stealing* only. Then, 2. by way of analogy, for detection in the actual commission of any other crime, as in the above passage of St. John; and in Plutarch, who has likewise applied it to the case of adultery. 3. It has been more remotely applied to denote such a degree of evidence of the commission of any crime, that is as clear and convincing, as if the person charged was detected in the commission of it: in which remarkable sense Lyfias has used it—*ὥς δὲ ἀπειράψῃ τα ὀνόματα οἰμαι μὲν καὶ αὐτοὶ ὁμολογήσιν. εἰ δὲ μὴ ἐπαυτοφώρῳ ἐγὼ αὐτὸν εἰλέω.* I have dwelt longer on this expression, because it has been passed over by Grotius and Dr. Hammond in their Comments on the passage.

Page 76. l. 12. *Giving colour to pleadings has frightened some.*) See Burnet's Life of Lord Hale, page 4. The meaning of "giving colour" in pleadings, is explained 3 Salk. 272, 273. and in Dr. Leyfield's Case, 10 Co. 90. a, &c.

Page 77. l. 17. *A plea in general.*) A plea with us is, strictly speaking, "an answer to a charge," whether of a civil or a criminal nature; though the word *Pleading* is commonly applied to the whole written proceeding on record. The name itself "Placitum," is borrowed from the Roman Law, and was there applied principally to the *judgment* or definitive part of the proceedings; placitum being in that sense "id quod placet." So Virgil expresses the decree of Jupiter. *Æn. i. v. 286.*

*Sic placitum. Veniet lustris labentibus ætas,
Cum domus Assaraci, &c.*

In the same manner the "*αἰρεσις*" of the Greeks, which the French * and other modern nations have contracted to *arret*. And it may be observed, tho' this language of a *judgment*

Sic volo, sic jubeo, stet pro ratione voluntas,

is in high character to express the decree of Jupiter, or of monarchs on earth, as absolute as Jupiter is feigned by the poets; it would neither suit, nor is it copied by our constitution: "*Ideo consideratum est*" is the language of our law in all the judgments that are given and entered on record. 1 Inst. 39. And this is certainly a more rational, and a less invidious expression of that power with which the law, in its determinations, is obliged to intrust one man over another.

Page 78. l. 5.) *The plea must not set out matters which amount to the general issue, &c.*) See Hobart's Report, 127.

Page 79. l. 14. *The legislature to authorize the general issue.*] This is done now almost in every act that passes,

Ibid. l. 22. *Never was made part of the law.*] See above, note to p. 65. line 31.

Page 80. l. 1. *Indictment for barretry.*) See Clarke and Periam, coram L. Hardwick, 1742. 2 Tr. Atkins, 340. And to the same purpose K. and Grew, 5 Mod. 18. And Hawk. P. C. b. II. c. 25. § 59. and b. I. c. 81. § 13.

Page 81. l. 32. *One of our legal Antiquarians.*) Somner on the Ports of Kent, p. 71.

Page 82. l. 13. *Comic humour.*) So in Donne's second Satyr.

In parchment then, large as the fields, he draws Assurances.—
Pope's 4th Vol.

* See the Dictionnaire de Trevoux, Voce ARRET.

The same kind of humour is to be met with in Sir R. Steele's comedy of the Funeral.

Page 83. l. 23. *In the common comparison.*) See Essay on Criticism, v. 309.

Woods are like leaves, and where they most abound,
Much fruit of sense beneath is rarely found.

Page 85. l. 5. *The other great external resource to a kingdom, that of trade, for a long time, did hardly exist.*) Commerce certainly existed at the period here spoken of, though comparatively in its infancy, even long afterwards. See 2 vol. Lord Lytt. p. 173, 215, &c.

Ibid. l. 18. *The church, we are told, had a third part of it.*] That is to say, of the land, which was almost the only property in those times. See Lord Lytt. 2 vol. p. 179, and the Authors cited in his margin. See likewise above, note to p. 31. line 18.

Page 87. l. 17. *The forms of conveyancing used in early times were few and simple.*] Very different, however, and even whimsical, as to their dates and execution. Often attested by 17 or more witnesses, even in common feoffments, as Mad. Form. Anglic. 181, &c. But the manner of *dating* was exceedingly affected; and from the errors, even in that manner, are become intricate: of which I will add one instance and refer to others; it being merely a matter of antiquity, useful only in reading antient deeds. Sometimes they were dated from the lunar cycle, sometimes from the indication. For the first see Mad. No. 225, where the date is Anno Gratiae 1238, cycli videlicet Decennovialis quarto—that is to say, the Lunar Cycle, that being the only one of 19 years; and the year is right, because the year 1238 corresponds with the 4th of that cycle.

In a charter of Robert Earl of Moreton, the date is A. D. 1085, indic. 14. concur. tertiâ Lunâ octavâ apud Pevenfel.—Here the dates, where intelligible, are wrong; for, by calculation, it will be found, the true indiction for the year 1085 is 8, the Lunar Cycle 3, and the Epact 3. This instance will be found in Dugd. Monasticon, Vol. i. 551. col. 2.

Other instances may be met with in Mad. Form. Anglic. No. 231. 1 Dugd. Monast. 555. col. 2. 2 Dugd. Monast. 959. col. 2. Other instances, 2 Rymer's Fœd. 542. Ibid. 367. Ibid. 113.

This subject may be closed with two observations, 1. That in most of the instances I have met with, the calculations are wrong: and therefore we are not much indebted to the monks for introducing astronomy into conveyancing, to mislead, as well as to puzzle us. The rule of Computation may be found in Spelm. Gloss. voce *Indictio*; but much better in our modern Elements of astronomy; and from thence any one (if it is worth while) may examine whether the dates assigned are right. But, 2. Even if they are right, they can be of no meaning, unless the year of our Lord, or of the King, are added; and if they are, of what use is such surplussage and redundancy? For instance, in that referred to 2 Rymer, 542, the date is Anno Dom. 1291. *Indictione quartâ Pontificatus Dom. Nicolai Papæ quarti anno quarto, et Regni 19 Dom. Regis Edvardi, &c. &c.*

I could not have known here, that the 4th indiction, as it is called, answered to the year 1291, or 19 K. Ed. I. for every period of the Cycle of Indiction has its 4th year; and they cannot all correspond to the year 1291: but if the indiction had been accurately expressed, as the 4th year of
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the 66th Indiction, it might be found that the 4th year of that indiction could correspond only to the year 1291.

Page 89. l. 18. *The great weight our ancestors attributed to livery, is better known to us than their forms of conveyancing.*] That our ancestors, however, were not unacquainted with written forms, even in very early times, and probably on occasion made use of the Greek tongue, there may be some reason to conjecture from the accounts left us by Strabo; who says, the Massiliotæ, or people who inhabited that part of France, about Marseilles, (originally a colony from Greece) spread the knowledge of the Greek tongue so much throughout France, that it "was used in their contracts which "were drawn up in that language." Strab. Edit. Casaub. fol. 181. a. and Strabo clearly proves that the Massiliotæ traded with Britain for Tin, Ibid, fol. 147. c. These passages in Strabo, seem to support a reading in Cæsar that is controverted by some of his editors—speaking of the Gauls, he says, "Publicis privatisque rationibus, litteris "Græcis utantur," lib. 6. § 14. Hottoman rejects the word *Græcis*; which Dr. Clarke has preserved in his fine edition of the Commentaries.

Page 91. l. 7. *The books speak of estates tail, as they may, by possibility, last for ever.*] So 3 Co. 61. a. 6 Co. 43. a. He calls them fettered inheritances, 10 Co. 38. a.

Ibid. l. 9. *Lord Coke expressly says.*] See 6 Co. 40. a.

Ibid. l. 22. *That these bills were always rejected.*] See 6 Co. 40. b.

Ibid. l. 23. *Perpetuities continued for 200 years.)* So Chudleigh's case, 1 Co. 131. b. and more particularly Mildmay's Case, 6 Co. 40. a. b.

Page 92. l. 4. *Will of the Duke of Norfolk to that of the late famous Duke.*) Alluding in the first to Lord Nottingham's famous argument in print; in the latter, to the Case on the old Duke of Marlborough's Will, determined in Chancery, Mich. Term, 33 Geo. II. and on Appeal in the House of Lords, Feb. 7, 1763.

Page 92, l. 19. *Alienations in mortmain Lord Coke shews.*) 2 Inst. 75.

Page 93, l. 4. *Origin of our modern jointures.*) This reasoning will be better understood by looking into the printed Case of Drury and Drury. Dom. Proc. May 26, 1762, and 1 Lord Raym. 291.

Page 93, l. 28. *For the many successful attempts of disposing to a use.*) See the Recitals in the Stat. 27 Hen. VIII. c. 10. and Lord Bacon's reading on that Statute.

Page 94, l. 14. *No good man will think of commending.*) Alluding to Lord Coke's observation, 2 Inst. 75.

Ibid. l. 20. *Executory Devises came in about Q. Elizabeth's time.*) Fulmerton's Case is said to have been the first. Cro. Jac. 592, and recognized, 1 Stra. 130.

Page 94, l. 23. *Though they have a small tendency to a perpetuity.*) See Salk. 229, and 2 Eq. Ca. abrid. 337, c. 9.

Page 95, l. 1. *Sir O. Brydgeman and Sir F. North intended Trustees to preserve contingent remainders.*) See the reasons annexed to the printed Case of Drury and Drury, Dom. Proc. May 26, 1762.

Page 95, l. 5. *The books have handed down Sir F. Moore as the first practiser of the common conveyance by lease and release.*) See 2 Mod. 252, and 2 Comment, 339.

Page 96, l. 19. *The advice of Lord Coke.*) 3. Co. 36. Butler and Baker's case.

Ibid. l. 30. *Old Greek will of Theophrastus the philosopher.*) See the Will at full length, preserved in Diogenes Laertius vit' Theophrast' edit. Meibomii, Vol. i. 296.

Page 96, l. 35. *The imputation of loquacity Tully has fixed on the Greeks.*) See de oratore, lib. 2, c. 23, lib. 3, c. 4.

Page 97, l. 21. *Lord Coke has pointed out the cause of it.*) In the Preface to his second Report.

Page 99, l. 9. *The attempt to render an estate unalienable, which the law abhors.*) See the Case of Stanley and Leigh, 2 Peer Will. 630, and the D. of Marlborough's Case above cited.

Ibid. l. 26. *In the feudal times they had other inconveniences.*) These are expatiated on in Lord Bacon's reading on the Statute of Uses.

Ibid. l. 27. *The inconveniencies.*) Of perpetuities in general, and of estates tail in particular, are recapitulated in a masterly manner, by Ch. J. Popham, in Chudleigh's Case, 1 Co. 138. b. 139, a.

Page 102, l. 29. *Many circumstances have occasioned a devise to be considered as an execution of a power.*) This notion was very strongly inculcated by the Court of K. B. in the case of Swift and Roberts, Trin. 4, of the present King; though in the printed Report of that case, that ground of argument is unnoticed. See 3 Burr. 1488.

Page 109, l. 19. *As where it is a county cause about a bridge.*) This supposition alludes to a case that happened, Trin. 2 Geo. III. B. R. in which this and several other instances are cited. The name of it is K. and Harris.

Page 119, l. 36. *This comes pretty near the method proposed.*) See above, p. 74, line 8.

Page 124, l. 2. *Each is only an accusation of a crime.*) Lord Coke expressly says, an indictment is but an accusation, and in lieu of the king's declaration, 9 Co. 118, a.

Page 125, l. 9. *If the Grand Jury throw out the bill.*) In what cases, see Saville and Roberts, 1 Lord Raym. 374.

Page 131, l. 13. *Swift's cow.*) Voyages, 2 vol. edit. Hawk. 446.

Page 132, l. 26. *The Law will not permit an affidavit or oath of the party, by going out of the charge, to be made an instrument of Scandal.*) See Astley, v. Young. 2 Bur. 810.

Page 136, l. 29. *In Lord Somer's impeachment.*) See the 14th article; to which he has answered, by denying the conclusion. It seems not improbable but some part of his doctrine in the *Banker's Case*, which leans this way, might be the grounds of this charge.

Page 136, l. 32. *Like Tom Touchy in the Spectator.*) Numb. 122.

Page 139, l. 9. *The speediness of justice in Turkey is openly avowed on this principle.*) See Sir W. Temple, Essay on Heroic Virtue, fol. edit. 225.

Ibid. l. 27. *As Czar Peter had.*) See the Preface to Lord Whitworth's Account of Russia.

Page 140, l. 16. *Sir H. Spelman.*) See his elaborate Treatise on the Terms, published in his Reliquiæ.

Page 141, l. 6. *Sir Thomas Smith.*) See either his own Book de Republica Angl. or Spelman's Reliq. before cited, p. 75.

Ibid. l. 13. *With other countries.*) The Roman Law allowed three years for civil suits. Wood. Imper. Instit. fol. 295.

Ibid. l. 33. *Clause in Magna Charta.*) Cap. 29. Mr. J. Blackstone's very elegant edit. in fol. p. 55.

Page 142, l. 6. *No real poverty is an excuse for the commission of theft.*) Lord Hale and Mr. Hawkins want reconciling to each other upon this point: the latter seeming to have made an allowance in the case supposed, which the law itself does not; and the former, if he is right in his legal position, yet is opposite to that humanity which may seem to arraign the law itself of severity; is certainly, however, at variance with his own conduct, which was ever dictated by humanity; and which often led him to relieve those vagrants, whom, in the capacity of a judge, he would censure as criminals. (See B. Burnet's Life of him.) The passages in the Pleas of the Crown of those great lawyers, to begin with Hawkins, are 1 Hawk. fol. 93, sect. 20, where that writer allows the authorities cited in his margin, that seem to prove the case of extreme necessity to be an excuse from felony, provided the necessity that induced the invasion of another's property did not arise from prodigality, or idleness in neglecting his own. And besides the authorities there cited, it may be observed, Lord Bacon, in his Maxims, adopts the opinion of Stamford; and asserts (without an express limitation as to the cause of the necessity) "that if a man steals viands to satisfy his present hunger, this is no felony nor larceny." Max. Regul. 5 Tracts, p. 55. Lord Hale, on the other hand, totally denies this to be the law of England, from the grounds mentioned in the Dialogue, which seem to be the most tenable grounds; and from the manifest insecurity of property, if any man might carry in his own breast a dispensation from the law establishing property by an allegation of a necessity, of which, he says, none but the party himself can judge. See Hale, Hist. Vol. i. p. 54, and 566.

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This latter reasoning, however, seems not altogether admissible: for this species of necessity seems to be a fact as capable of being ascertained by evidence, as any other case of necessity allowed by the law; of which many instances are mentioned in the books. Besides, it is impossible to be supposed that when the Jewish law, which, though it did not excuse theft in these circumstances from penalties, yet * did not mark it with the same infamy; and when writers of natural law (some of whom Lord Hale cites) allowed extreme necessity as a plea, that in their idea the truth of it in point of fact could not be ascertained. Lord Hale, it is true, complains, that in France, and elsewhere, the Jesuits had made a very bad use of those maxims of natural law, by encouraging theft. Perhaps so; but at this day, by the law of France, it is otherwise: Parochial provision has not yet obtained there; and, excepting some few hospitals for public relief, of modern foundation, as at Paris, Lyons, &c. the indigent depend altogether upon the monasteries or *privace quetes*, the latter of which are collected from house to house on the great feasts; and in some places, as at Blois, by some young lady of the first distinction in the parish. But in France, the case of necessity is allowed as a plea against the punishment of theft; or rather, as a very sensible writer has put it, is excluded from the definition of the crime. Theft, he defines from the Roman Law, “*con-*”
tractatio fraudulenta rei alienæ lucri faciendi gra-
tiâ, &c. and adds, *lorsque on prend par nécessité et*
uniquement pour s'empêcher de mourir de faim, on ne
tombe point dans le crime du Vol. Vouglans. Instit.
 au droit crimin. 553.

* See Proverbs, c. 6. v. 30, 31.

Lord Hale, however, under the impartiality of a judge, never forgets the feelings of a man; and adds, in conclusion—"Though I do agree a judge ought to be tender in such cases, and use much discretion and moderation." fol. 566.

Page 142, l. 11. *Provisions made by law for the poor.*] That is, the System of Poor Laws from the 43 Eliz. to this time. Till the dissolution of the monasteries, it has been commonly thought the poor were maintained only by them; but there are some antient ordinances (particularly one in the Mirror, c. 1. § 3.) that look as if parochial provision was always the legal one; and consequently the statute of Eliz. in this case, only revived, new-modelled, and effectuated the Common Law. The words of the Mirror are remarkable—Ordeine fuit que les povres fuissent susteinus per les *Parsons Rectors et les parochians*, cy que nul ne morust per default de susteinance.

Page 142, l. 20. *Insolvent laws—humane expedients.*] The king of Prussia's Observations seem just. Memoir. Brandenb. Vol. iii. p. 134, edit. 4to. Solon, it seems, brought in laws for the relief of Insolvent Debtors. Σολων ο νομοδότης Αθηναίων, Φίλων πτωμένων οφειλοντων, ΧΡΕΩΝ ΕΙΣΗΓΗΣΑΤΟ ΑΠΟΚΟΠΑΣ. *Solon the Athenian lawgiver, at the request of some of his friends who were in debt, introduced an abolition of debts.* See Suidas in Voce Σολων. Perhaps, Suidas means, that *Solon* first introduced this kind of laws into Athens; for Hen. Stephens, in his explanation of the word αποκοπή, has cited the very same expression χρέων εισήγησατο αποκοπης somewhere from Plutarch, as applied by him to *Lycurgus*; who therefore had done the same at Sparta 300 years * before Solon did it at Athens. The most learned

* See Dr. Blair's Tables.

moderns have been of opinion that the Deceiv-
 ral Law "de debitore inope in partes dissecando"
 was made to enforce a division of the effects or
 services of the debtor among his creditor, and
 therefore in the first case it was something of the
 nature of our Bankrupt Laws. See Heineccius
 Antiq. Juris Romani, lib. 3. tit. 30. § 4, p. 159.
 and particularly Dr. Taylor's very learned Com-
 ment on that Law, published 1742, 4to. vindicat-
 ing the sense and humanity of that construction
 against the literal interpretation contended for by
 some of the Antients.

Page 143, l. 27. *The obligation to satisfy will re-
 vive with the power of doing it.*] And of that opi-
 nion was Lord Hardwick, 1 Tr. Atkins, 256 ex
 parte Burton.

Page 144, l. 19. *It amerced a plaintiff.*] See the
 Case of Saville and Roberts, 1 Lord Raym. 380.

Page 145, l. 5. *In former times real actions were
 almost the only suits.*] In support of what is here ad-
 vanced, see the following authorities: Booth on
 real Actions, fol. 247. 2 Inst. 511. Madox's Hist.
 of the Exchequer, c. 12. p. 293. and 5 Co. 39.

Page 147, l. 22. *Form an acquaintance with Lord
 Coke against his own directions. He tells them they
 should first read the later Reports.*] He tells them so
 in the Preface to one of his Reports; and Sir Har-
 bottle Grimstone, in his Preface to Cro. Car. adopts
 his way of thinking. The same general advice is
 to be derived from Lord Hale's admirable Preface
 to Roll's Abridgement.

Ibid. l. 29. *Grotius gives to the study of history.*] See his small Treatise de Instituendis Studiis.

Page 148, l. 8. *Out of the old fields must spring the
 new corn.*] Preface to the first Report, ad finem.

Page 149, l. 25. *Dr. Middleton.*] In his Life
 of Cicero.

Page 149, l. last. *Has copied his rant.*] For a like sublime idea of the profession of a lawyer is expressed in Tully de Legibus, b. 1. c. 4. Quid enim est tantum, quantum Jus Civitatis? quid autem tam exiguum quam est munus hoc eorum qui consuluntur.—and concluding (c. 6.) et qui aliter jus civile tradunt, non tam justitiæ quam litigandi tradunt vias.—It is not improbable, but that this passage might in a manner be the mould of that cited from the Letters on the Study of History, 8vo. p. 149.

Page 151, l. 20. *Lay People.*] Finch has used this expression no less than seven times in the compass of two Pages. Law, B. 4. p. 381. 2.

Ibid. l. 22. *Mr. Madox tells you.*] Hist. Exchequer, c. 2. § 9. fol. Edit. 41.

Page 151, l. 33. *From the Parliament Rolls.*] The Roll cited is in the Preface to Gibson's Codex.

Page 152, l. 10. *Usage pretty well established the common lawyers in the custody of the great seal.*] See the Chronicles of Dugdale, Rapin, and Sir Charles Whitworth.

Ibid. l. 24. *Lord Coke says.*] In the Proem to his 2 Inst. p. 3.

Ibid. l. 28. *Selden.*] Ad Fletam, c. 7. § 7. fol. 518.

Ibid. l. 32. *No evidence of history to explain these words, as they have been understood.*] Lord Lyttleton has proved, that the word "University" was not for a long time a local term. Vol. ii. p. 328.

Page 153, l. 3. *Fortescue and Lord Coke.*] Fortescue, c. 47, 48, 49. Lord Coke's Preface to 3 Report.

Page 153, l. 19. *Some dissertations of this kind.*] Particularly by Mr. Agard; Mr. Joseph Holland (the same, I take it, who is mentioned by Lord Coke in his Preface to 3d Report); and by Mr.

Mr. Whitlock, afterwards a Judge of the King's Bench in Car. I. time, and father of Sir Bullstrode Whitlock.

Ibid. l. 27. *Seem to have been fixed in the center of the town.*] So Fortescue describes them, c. 49.

Page 154, l. 6. *Map of London in Q. Elizabeth's time.*] In Maitland's History of London.

Ibid. l. 27. *The number of distinct houses.*] Lord Coke in his preface to the third Report reckons 14 Inns of Court and Chancery, comprehending the two houses of Serjeants Inn; all of which, except Serjeant's-Inn in Fleet-street, are more or less dedicated to the Law at this day.

Page 155, l. last. *The editor of Sir H. Spelman not quite so accurate.*] For this inaccuracy, is to be laid to the Editor of the Glossary; Spelman having carried it no further than the letter R. See Bp. Gibson's Life of Sir H. Spelman, prefixed to his Remains. The passage censured in the Dialogues, is in the Gloss. tit. *Serviens ad Legem*.

Page 156, l. 3. *Apprentice.*] Apprentice and Barrister are understood in general to be the same, 2 Inst. 214, and 2 Tr. Atkyns, 174. Mitchel's Case.

A learned writer of these times (in his Observations on the antient Statutes, p. 279, notes, 2d edit.) seems rather disgusted with the common mechanical sense of this word; and thinks the Profession degraded by the application of the term to any of its members: and from thence labours to shew that our old writers have, in reality, been mistaken in their application of it to a liberal profession. He conjectures the word "apprentice" (so used in our books) to have been "an erroneous manner of filling up the contraction ap-de-la-ley; which meant (as he conceives) appris de la ley, and not apprentice de la ley."—It may be so: but does this get rid of his objection?

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What is there, in the genuine sense of the word *apprentice*, (which signifies nothing more than a learner) more illiberal than in the word *appris*? Are they not both formed from the same root? But the word is become illiberal, by its application to common trade.—To this it may be observed, that the original sense of words traced to their etymology, will deviate greatly in course of time in their subsequent application: and this flux of language is full as remarkable in the names of *sciences* themselves, as of *professions* and *offices* in life, which are things of a much more variable nature. Perhaps hardly one of either in its present application, corresponds exactly with its original meaning: the reason of that, in many cases, is, that the *name*, for common convenience, has all along continued the same, but the thing has not; and therefore in all these cases, the name is sometimes *too great*, and sometimes *too mean*, for the thing it describes. Thus, *History*, as if it comprehended *all knowledge*, is too great in its etymology for an application to a mere detail of facts. Thus *Musick* is a term comprehensive enough for all the liberal arts; and indeed, however confined at present, it is evident from the passages cited * below, that under this term the Antients included Poetry, Philosophy, and what in general are called the Belles Lettres. *Geometry*, on the other hand, which has the range of the universe itself for its field, is too mean a name for the science in its present state. Thus too in offices, the terms *apprentice* and *clerk* †, origi-

* See the Plutus of Aristophanes, 2 scene, v. 190. Terence's Prologues to the Heautontim, v. 23. to the Hecyra, v. 15. and Quintil. lib. 1. c. 16. Illis antiquis temporibus *Idem Musici et Vates et Sapientes* judicarentur - Mittam alios, Orpheus et Linus, &c. and so Cic. 1. Tusc. Quæst.

† See Dial. II. page 231.

nally of the most liberal import, and from thence applied to learned Professions, is now perhaps degraded by the generality of the application; as on the contrary, those of *Serjeant, Marshall, Steward*, are raised from their original, by being used to denote some of the first rank in life, and in the Profession of the Law.

Page 157, l. 5. *Dugdale, instead of defining, copies Lord Coke.*] See Co. Preface to 3 Report, and Dugd. Origin. Jurid. 144.

Ibid. l. 22. *Like the scholars of Pythagoras.*] The five years silence enjoined by Pythagoras, is touched on by many writers—*παροιμία· σιωπηλοτερος εσομαι κη των τε Πυθαγορα, τελεσθεντων.* PENTAETH GAF XRONON *ησκαν σιωπην.* Suidas in voce Pythagoras. *It is a proverb; I will be more silent than those that have been brought up by Pythagoras, for they practised silence five years together.* So Lucian, in his auction of Philosophers, when Pythagoras is put up to sale, makes him tell the bidder, that in order to instruct him, he will teach him *το μεν πρωτον ησυχην μακρη κη αφωνιη κη ΠΕΝΤΕ ΟΛΩΝ ΕΤΕΩΝ λαλειν μηδεν, first to continue in long unbroken silence, and say nothing for five whole years.* This anecdote of Pythagoras' silence has likewise given birth to some lively Greek epigrams. See Brodæus' Collection, fol. 157. The Indian Brachmans, it seems, injoin seven years silence to their Noviciates. Voltaire Hist. Univers. Vol. XI. p. 51.

Page 160, l. 26. *The Roman laws had scarce any regulations as to Lawyers in the age of the Republic.)* What they had afterwards, see Dr. Taylor's Elements of the Civil Law, p. 39. and Wood's Instit. Imperial Law, fol. edit. 298, b. 4, cap. 1.

Ibid. l. 34. *In the Athenian state, orators.)* See Petit Leges Atticæ, Tit. 3. lib. 3. fol. 18. *μη εισελθην τινα ειπειν, μηπω τριακοντα ετη γεγονοτα, &c. That no one appear as a public speaker, that has not attained the age of thir-*

ty. See Petit's Comment, fol. 259. Perhaps it may be worth adding, that in Greece the understanding was supposed to arrive at its maturity at the age of thirty, and to begin to decline at about nine-and-forty. *αἰμαζει δὲ τὸ μὲν σῶμα, ἀπὸ τῶν τριάκοντα ἔτι μέχρι τῶν πεντὲ καὶ τριάκοντα· ἡ δὲ ψυχὴ, περὶ τὰ εὖς δέξιν πενήτηκοντα.* *The body continues in full vigour, from the age of thirty till five-and-thirty; but the intellect, till within one of fifty.* Aristot. Rhet. b. 2. c. 14.

Dr. Middleton, I remember, observes that Demosthenes first began to distinguish himself in Athens (as Tully did in Rome) at the age of 27; which, if it is an exception to Aristotle's observation, it is certainly no impeachment of the justness of it; because Aristotle, if he is supposed to mean that the understanding in general is in its full vigour at thirty, did not mean to make genius the standard of human nature. Besides, the *dawn* of genius, like that of ordinary faculties, is surely to be distinguished from its *meridian*. See Mid. Life of Cic. edit. 4to. p. 37. It may be added, however, that as to Demosthenes, this point is controverted by Monf. Toureill, both from the authority of Demosthenes himself, and from the inconsistency of Plutarch, on whom Dr. Middleton founds his observation. Toureill, pref.

Ibid. l. 35. *In the Athenian State, Lawyers, distinguished merely as such, seem to have been of little regard.*] In support of what is here advanced, without going far back to antient authorities, it may be sufficient to rely on the opinion of an eminent writer, whose researches on the subject of his profession, are in great esteem.—“qual’ altra Gente
“ possiamo noi qui in mezzo recare, la quale colla
“ Romana potesse in ciò contendere? - - - non i
“ Greci stessi (per tralasciare d’ attri) presso dè
“ quali l’ufficio de’ Giuresconsulti si restringeva in
“ cose

“ cose pur troppo tenui, e basse, e la lor opera si
 “ raggirava solamente nell’ azioni, nelle formole,
 “ e nelle cauzioni ; in guisa, che i Professori, come
 “ quelli ch’ erano della più vile e bassa gente, non
 “ venivano decorati col venerando nome di *Giure-*
 “ *sconsulti*, ma di semplici *Prammatici*.” Giannoni
 Istoria Civile di Napoli, tom. i. lib. 1. c. 7.

Page 161. l. 7. *Great body of Laws, if it is in a
 great measure the consequence of Freedom.*] See con-
 clusion of the third Dialogue.

Ibid. l. 29. *Purity of the profession.*] See Justice
 Mitchel’s Case. Tr. Atk. Rep. Vol. ii. 173.

Ibid. l. 33. *As Tully has done.*] De Oratore.

Page 162. l. 11. *The antique masques and revels
 upon extraordinary occasions.*] The writers mention-
 ed in the Dialogue will shew, that no expence or
 invention were spared in those exhibitions. The
 times during the reign of Q. Elizabeth, and long
 after, were surprisngly romantic. In the late pub-
 lication of Lord Bacon’s Letters, by Dr. Birch,
 the speeches penned by the then Mr. Bacon, on oc-
 casion of a device exhibited to the Queen in 1595,
 on the anniversary of her accession, are preserved ;
 the general design is not altogether unlike the en-
 tertainment exhibited to Darius, mentioned in the
 first book of Esdras, c. 3.

The last *revel* in any of the inns of court was in
 the Inner Temple, held in honour of Mr. Talbot,
 when he took leave of that house, of which he was
 a bencher, on having the great seal delivered to
 him.

A friend, who was present, during the whole
 entertainment, obliged me with the following ac-
 count ; which, with some circumstances supplied
 by another gentleman then likewise present, seem-
 ed worth adding here, by way of comparison
 with

with those in former times ; and as it may probably be the last of the kind.

“ On the 2d of Feb. 1733, the Lord Chancellor came into the Inner Temple Hall about two of the clock, preceded by the master of the revels (Mr. Wolaston) and followed by the master of the Temple (Dr. Sherlock) then Bp. of Bangor, and by the Judges and Serjeants, who had been members of that house. There was a very elegant dinner provided for them and the Lord Chancellor's officers ; but the Barristers and Students of the house had no other dinner got for them, than what is usual on all *Grand Days* ; but each mess had a flask of claret, besides the common allowance of port and sack. Fourteen Students waited at the Bench Table, among whom was Mr. Talbot, the Lord Chancellor's eldest son : and by their means any sort of provision was easily obtained from the upper table by those at the rest. A large gallery was built over the screen, and was filled with ladies, who came, for the most part, a considerable time before the dinner began : and the music was placed in the little gallery, at the upper end of the hall, and played all dinner time.

As soon as dinner was ended, the play began, which was *Love for Love*, with the farce of the *Devil to Pay*. The actors, who performed in them, all came from the Haymarket in chairs, ready dressed ; and, as it was said, refused any gratuity for their trouble, looking upon the honour of distinguishing themselves on this occasion as sufficient.

After the play, the Lord Chancellor, Master of the Temple, Judges, and Benchers, retired into their Parliament chamber ; and, in about half an hour afterwards, came into the hall again, and a large ring was formed round the fire-place (but no fire nor embers were on it). Then the master of the revels, who went first, took the Lord Chancellor by the right hand ; and he, with his left, took
Mr.

Mr. J. Page, who, joined to the other Judges, Serjeants, and Benchers present, *danced*, or rather walked, *round about the coal fire, according to the old ceremony, three times*; during which, they were aided in the figure of the dance by Mr. George Cooke, the prothonotary, then upwards of 60: and all the time of the dance, the *antient song*, accompanied with music, was sung by one Toby Aston, dressed in a bar gown, whose father had been formerly Master of the Plea Office in the King's Bench.

When this was over, the ladies came down from the gallery, went into the Parliament chamber, and stayed about a quarter of an hour, while the hall was putting in order; then they went into the hall and danced a few minutes. Country dances began about ten, and at twelve a very fine collation was provided for the whole company: from which, they returned to dancing, which they continued as long as they pleased; and the whole day's entertainment was generally thought to be very genteely and liberally conducted. The Prince of Wales honoured the performance with his company, part of the time: he came into the music gallery incog. about the middle of the play, and went away as soon as the farce of walking round the coal fire was over."

Page 162. l. 27. *The raillery our poets have thrown upon the diversions now before us.*] See Dr. Donne, in his Satires—Prior, in his Alma—Pope, in his Dunciad—Not to mention the Dance in the Rehearsal; where that abovementioned of *round-about our coal fire* is meant to be taken off.

Page 165. l. 13. *Longinus' comparison of the Odyssey to the setting sun.*] In his ninth chapter, his words are, *ὅθεν ἐν τῇ Ὀδυσσεύα παρῆικασαι τις ἀν καταδυομένη τοῦ Ὠμήρου ἔλιν, ὃ ΔΙΧΑ ΤΗΣ ΣΦΟΔΡΟΤΗΤΟΣ ΠΑΡΑΜΕΝΕΙ ΤΟ ΜΕΓΕΘΟΣ.*

ΜΕΤΕΘΟΣ. Edit. Pearce, 8vo. p. 56. Whether Prior had the latter words in view, one can not say ; but it is difficult to conceive how the same image could be more accurately or forcibly transferred from one language to another. That lively and most agreeable writer was very fond of copying from the Grecian school, but always in such a manner, as to shew the master where he even meant to imitate ; of which this little poem is a beautiful instance : the learned will easily trace in the *looking-glass* of Prior, the poet and his muse (as it may be inscribed) of Moschus.—“ Caprice ” is the general subject of both Poems ; and many images of the latter are transplanted into the former.

N O T E S

O N

D I A L O G U E III.

PAGE 172. The several scenes, alluded to in the introduction, are so well known in themselves to most travellers, and have been so often described, that very little need be said of them here. To the other formal accounts of *the Lake of Geneva*, may be added, the more picturesque one of Rousseau, in his *Nouvelle Heloise*, Lettre 6. and 17. part 4th; who, it may be observed, tho' a citizen of Geneva, has given a much more pleasing idea of the lake, and of the simplicity of the Valesians, than he has of the liberality of his own fellow-citizens. See *Nouvelle Heloise*, part 1. lettre 23. and part 6. lettre 5.

The *Boromean Isles*, in the Lago Maggiore, and *fall of the Rhine* near Schaffhausen, are described by Keyser and other writers. As to the *sinking of the Rhone*, something may be said here, as it is not so easy to find a description of it in print; considerably to the right, out of the great road from Geneva to Pont-beauvoisin, very near Pont Bellegare, are the remains of a bridge, called Pont de St. Lucè, where

where the Rhone is interrupted by prodigious rocks, sinks under-ground after forming a pool of above 100 feet depth, and totally disappears, leaving the several intermediate spaces, between the huge masses of rock that block up the channel, quite dry; and afterwards bursts out again with great rapidity, about a gun-shot from the point where it loses itself. The channel beyond is terminated on each side by very high perpendicular rocks; and the river, it is said, after the melting of the snows, rises there above 30 feet. The Mole in Surrey, and the river Arethusa in Sicily (mentioned, Virgil, 10 Eclog. and 3 Æn.) are similar instances of rivers losing themselves underground, and for a space interrupting their course.

The Alps are characterised as the *nurse of everlasting snows* and *pillars of the sky*, images borrowed from Pindar's description of Ætna in his first Pythian.

—————Κίων
Δ' ἑρᾶνια συνεχεῖ
Νιφούσσ' Αἰτνα, πανετες
Χιονος ὀξείας τιθῆνα.

The *ivers* alluded to are the Rhine, the Rhone, and the Tefin, which all rise among the Alps; not to mention several other rapid rivers whose course is more confined.

Page 173. l. 1. *Like the travelling of Homer's deities.*] The line alluded to are these:

Ὡς εἶπας· κὼ ἀπὶ θῆσε Θεᾷ λευκωλένος Ἥρη,
Βῆ δὲ κατ' Ἰδαίων ὄρεων εἰς μακρὸν Ὀλυμπον.
Ὡς δ' ὅτ' ἀναιζή νοος ἀνέρος, ὅσ' ἐπὶ πολλὴν
Γαίαν ἐληλυθώς, φρεσὶ πευκαλίμῃσι νοήσῃ

“ Εὐθ’ ὡς ἢ ἐνθα”, μειοῖνθ’ οἱ τε πολλὰ
Ὡς κραιπνῶς, μίμναια διαπτατο πατρία Ηρη.

Il. 15.

The trembling Queen (th’ Almighty order given)
Swift from th’ Idæan summit shot to heaven,
As some way-faring man, who wanders o’er
In thought, a length of lands he trod before,
Sends forth his active mind from place to place,
Joins hill to dale, and measures space with space ;
So swift flew Juno to the blest abodes.

POPE’S Translation.

Page 174. l. 12. *Some allow us nothing but hips and haws.*] See this touched on, Spect. No. 69.

Ibid. l. 28. *Addison.*] In the Spectator, No. 393.

Ibid. l. 30. *Bishop Berkeley.*] Pope’s Letters, Vol. viii. p. 279. Letter I.

Page 175. l. 3. *That lively monarch.*] Char. II. who made this observation. See Sir W. Temple on Gardening, folio edition of his works, p. 181.

Page 176. l. 6. *If you can give up that amiable enthusiasm of visiting places famous by tradition.*] This enthusiasm has been finely described by Tully, in more than one place. See lib. 5. de finibus, and de legibus, lib. 2. c. 2.

Page 177. l. 9. *The imprecation of the Tartars, in wishing they may live in one place.*] See Bell’s Travels to Peterburgh, Vol. i. p. 33. 4th edit.

Page 179. l. 32. *Parental affection.*] Sir W. Temple considers parental authority in opposition to *contract*, as the origin of Society. On Government, 8vo edition, p. 60. 63. Thence he concludes the government of a single person is the most natural, p. 82. And yet he calls the *consent of the People* the Bottom, or Foundation of Government, p. 84, 90. May it not be said

——pergit

——pergit pugnancia secum
Frontibus adversis opponere?——

Page 180. l. last. *Would appeal to fact.*] Sir W. Temple's great objection to compact being the origin of Society, seems to arise from this quarter, "the want of facts, or any actual compact." Mr. Locke, in deducing from principles, the true origin of Government, was aware this objection would occur; and has answered it from the silence of History. On Govern. §. 100, 101.

Page 182. l. 9. *The actual administration of Government.*] This observation is much insisted on in the course of this Dialogue: without a constant eye to it, the Constitution of this or of any other country will be so far from being a thing fixed in its nature, that it may be every thing in its turn: and one might as well mistake the variation of the mariner's needle for the line of direction. It was therefore necessary to set out with, and all along to regard this distinction. See § 8. p. 183. § 16. p. 196. § 18. p. 204. § 20 p. 213. § 64. p. 311.

Page 182. l. 15. *Every law (as a wise ancient observed) is a kind of compact, and a security of some right.*] The words of Aristotle, the substance of whose observation is engrafted in the Dialogue, are —Ο Νόμος Συνθηκη, η̃ καθάπερ εφη Λυκοφρών ο Σοφιστης, εγγυητης αληθους δικαιων· αλλ' η̃ οιος ποιειν αγαθος και δικαιος τις πολιτας. Arist. Polit. edit. Franc. § 19. p. 74. Dr. Taylor, in his Elements, has paraphrased this admirable passage of Aristotle's; and illustrated it by some citations from the Roman Law. Elem. 154. For a Comment to the latter part of Aristotle's Observation, see Note to page 246.

Page 183. l. 9. *Prefixe, and other Historians, tell us Henry the Fourth entertained a project.*] See likewise the Memoirs of his own minister, Sully, Vol.

Vol. iii. 4to. 382. and before: which project, Voltaire, with his usual scepticism, denies Henry ever entertained any idea of. *Essay sur l'Histoire General*, Vol. XIV. p. 381.

Page 183. l. 17. *Mr. Locke.*] On Government, § 90.

Page 186. l. 8. *The Free States of Italy.*] See this admirably deduced in Machiavel's first book of the History of Florence. The same subject is likewise treated of more at large in Denina's *Revoluzioni d'Italia*.

Ibid. l. 30. *Mr. Pope, when he says, &c.*] Mr. Pope, however, was not singular in this notion; Sir W. Temple had broached it long before him. See *Essay on Pop. Discont.* fol. edition of his Works, Vol. i. p. 266.

Page 187. l. 13. *Mr. Pope himself had on another occasion, expressed himself very differently.*] See the Letters to Bp. Atterbury, Vol. IX. Letter 4. p. 79.

Page 188. l. 22. *Darius was fair in his manner of stating the proposition when he asserted, &c.*] The original runs thus—Τριων γὰρ προκειμενων η̃ παντων των λεγων αριστων εοντων, δημικτε αριστα η̃ ολιγαρχικη η̃ μοναρχικη, πολλω ταυτε προειχεν λεγων. *For of the three given forms, each supposed the best of its kind; that is to say, the best democracy, oligarchy and monarchy; I insist the last is by far the most preferable in itself.* Herod. Thalia. lib. 3. § 82. edit. Gale. Burlemaqui, who undertakes to discuss this question (in his *Droit politique*) has translated the whole passage into French, and inserted it into his text, and says little more. Vol. ii. part 2. c. 2.

Page 189. l. 2. *Government will be ever fluctuating.*] The King of Prussia's reflections on this subject are animated and fine. *Mem. Brand.* Vol. iii. p. 87—92. 4to edition.

Ibid.

Ibid. l. 31. *It is comparatively but of late that France has united all its dutchies to the crown.*] In Hen. VII.'s time, latter end of the fifteenth century. See Hainault's *Abregè de l'Histoire Franç.* and 3 Hume, 20, 29.

Page 190. l. 26. *England, with respect to its possessions, or its connections with the continent, was never so strictly an island.*] The interest of England, with respect to continental dominion, in its early history, is finely touched on. Lord Lytt. Vol. ii. p. 93. Ibid. p. 155. Ibid. p. 546.

Page 191. l. 24. *A French critick.*] Abbe du Bos *Reflexions Critiques*, Vol. i. c. 39. p. 382.

Page 193. l. 13. *The English constitution has been the subject of much applause to many foreign writers of the greatest eminence.*) For instance, *Montesquieu*, who has a chapter upon it in his *Esprit des loix*, lib. 11. c. 6 which does him honour for his idea of it—*Voltaire*, in his *Letters on the English Nation*, Vol. iv. of his Works, chap. 21. and chap. 22. And in another work where he goes so far as to say—*Il me semble a moi, s'il y a un gouvernement dont on pourroit de nos jours proposer pour modèle de la sagesse, c'est celui d'Angleterre. Le Parlement est l'arbitre du peuple et du roi: et le roi a tout le pouvoir de faire du bien, mais il n'en a point pour faire du mal.*—This sentiment is exactly similar to the famous one of M. *Gourville*, mentioned by Sir W. Temple, and which seems to have struck K. Car. II. so much for its propriety. See Sir W. Temple's *Memoirs*, fol. edi. p. 384. To the above testimonies may be added, that of the D. *de Rochefoucault*, who seems to have had a much better opinion of the English Constitution, than he had of human nature itself. See *Supplement a ses pensees Reflex.* 177, 178. &c. &c. Besides these positive direct commendations,
it

it is easy to meet with many incidental reflections in its favour from foreign historians, quite from the *Sieur de Comines* (Memoirs, lib. 5. c. 19.) down to the *King of Prussia*; the latter of whom seems to have a tolerable idea of the English government, tho' but an indifferent one of its administration. See *Memoir. de Branden.* part 3. p. 124. 127. That too has been the idea of another foreign writer. See *Monf. le Blanc's Letters.* Lett. 1. &c. &c. But, if the exception itself required an answer, there are not wanting even foreign writers to answer it: who have viewed those little inequalities between theory and practice, which must ever happen in the complicated machine of government, as in every other, with more candour and discernment. A passage to this purpose from a work lately published by Mr. de Lolme, will be sufficient for the present purpose—*Les corps celestes eux mêmes sont sujets à des alterations dans leur cours; ne cherchons donc point dans les établissemens des hommes une entière régularité—en un mot, ceux qui, après avoir examiné la nature du Gouvernement de l'Angleterre, en considerant les effets, c'est à dire, en viendrent à la seule preuve que dans des choses de ce genre, on puisse regarder come sûre, avoueront qu'il a par dessus tous les Gouvernemens, qui nous sont connus, les trois avantages essentielles; de protéger le plus sûrement, d'exiger les plus petits sacrifices, et d'être le plus susceptibles de perfection. Constit. de l'Angleterre, p. 261, 265.*

Page 193. l. 19. *Have decided in favour of that mixed form.*) See Mr. Burlamaqui, in the chapter cited above, p. 118. Can an Englishman, independent of the blessings he feels, have in theory a better relish for his own Government and Constitution, than when he finds he actually enjoys what the wise and good in all ages have wished for, and
which

which they pictured to themselves more as an idea, than what was likely ever to become real? Says Plato—*Μοναρχία, τυχθεῖσα ἐν γράμμασιν ὡς νόμος λεγόμεν, ἀρίστη πασάν.* *A monarchy, whose limits are prescribed by laws, is the best form of all.* Plato's Politicus. Which is the portrait of our own. To this notion of Plato, it will not be disagreeable, it is presumed, to add those of Tully, Tacitus, and Polybius to the same purpose.

In Tully, among the fragments of a work we have great reason to regret the loss of, there is this passage: *Statuo esse optimam constitutam Rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, confusa modicè; nec puniendo irritet animum immanem ac ferum; nec omnia prætermittendo, licentiâ Cives deteriores reddat,* De Repub. lib. 2. edit. Olivet. Vol. iii. p. 527.

Tacitus has remarked—*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex his et constituta Reipublicæ forma laudari facilius quam evenire, vel si evenit haud diuturna esse potest.* Annal. lib. 4. edit. Gronov. p. 290.

And Polybius to the same purpose—*ἄλλοι γὰρ, ὡς ἀρίστην μὲν πρυτανεὺς πολιτείαν, τὴν ἐκ πάντων τῶν εἰρημενῶν ἰδιωμάτων συνεισώσαν· τῆτι γὰρ τῇ μερὲς οὐ λόγῳ μόνον ἀλλ' ἐργῷ πείραν εἰληφάμεν· Λυκεργῆ συστήσαντος πρώτῃ κατὰ τῆτον τὸν τρόπον τὸ Λακεδαιμονίων Πολιτεῖμα.* Polyb. Hist. lib. 6. edit. Casaub. p. 452.

For it is evident, that is to be deemed the best form of government, which is constituted from the peculiarities of those simple forms already enumerated: and of this particular we have had proof, not from speculation merely, but from fact: Lycurgus having first given a model of this kind in the constitution of the Lacedæmonian government.

Page 194. l. 4. *King governing according to settled laws.*) See the Bill of Rights and Act of Settlement.

Page 195. l. 17. *Idea of Liberty in society, &c.*] The marquis Beccaria has expressed the same thing in another manner. "L'opinione, che ciaschedun cittadino deve avere di poter fare tutto ciò, che non é contrario alle leggi, senza temerne altro inconveniente che quello che puo nascere dall'azione medesima, questo è il dogma politico, che dovreb' essere dai Popoli credato, e dai supremi magistrati colla incorrotta custodia delle leggi predicato, &c. § 8. and afterwards, Io non trovo eccezione alcuna a quest' assioma generale che ogni Cittadino deve sapere, quando sia reo o quando sia innocente," &c. § 11.

Page 196. l. 9. *Each possessed of valuable privileges.*) For particulars, it is abundantly sufficient to refer to the first Commentary, p. 159. As to the nature of Privilege in general, Lord Clarendon has given some idea. Hist. B. 4. p. 311. Oxf. edit. folio. But much more may be learned from the Debates in Parliament from the Revolution to our own times.

Ibid. l. 13. *Judges assistants to the House of Lords, but are members of the body of the Commons, as they styled themselves.*) Viz. In the great case of Bridgman and Holt, in the House of Lords. Shower. Ca. in Parl. 117.

Page 196. l. 29.) *As if the liberty the people were formerly possessed of was rather an act of grace in the crown, than a matter of right in themselves.*) See Tyrell's Hist. in the beginning; and Mr. Hume's, in many places, particularly those cited below, on notes to p. 59. See, on the contrary, Lord Lyttelton's History, particularly Vol. i. p. 160. Vol. ii. p. 285, 286. which passages, I am happy to find, contain precisely the same idea as what had been before described in the Dialogue; but traced out in history, with a flow of pencil and richness of colouring

colouring that characterises the great master, and sets comparison at a distance.

Page 197. l. 16. *Though I am aware the laws which I urge, as a proof of the limitation of the monarchy, are turned against us.*] This is more fully examined afterwards, p. 128, &c.

Ibid. l. 29. *Others have argued from the want of Returns to Parliament, to the want of Being of the Parliament itself.*] Mr. Hume's Conclusion (Vol. i. p. 390. in the note) seems inconsequential; because, if at other times a representation in Parliament had been ever so general and regular, yet, during the intervals of Parliament, some such measures in those times would have been pursued, as much as if there never was a Parliament. It might as well be said, that issuing the writs for *Ship-money* was a proof, that there was no right of representation in the people; at that time there was no actual representation. So in the times he there treats of, no historical proof is to be had of the representation of the Commons then existing; but the inference that there was then no such right of representation in the people, seems far from being just; it is at best but only negative evidence. See the Antiquity of the Commons discussed, by Sir Robert Atkyns. Tracts, p. 25 to p. 35. and Lord Lyttelton in his History has denied and refuted the notion in some of our writers, (See Mr. Hume's 2d Vol. p. 46. and *ibid.* p. 93.) that the Earl of Leicester's usurpation, about the year 1265, in Hen. III's time, was the origin of the Representation of the Commons. Lord Lytt. Vol. ii. p. 277 to p. 279. 4to edit. and his Observations on the Stat. 5 Rich. ii. p. 281. An ingenious writer seems to promise an express work, to prove a representation of the Commons before the 49 Hen 3. See

3. See Dr. Stuart's Historical Dissertation, p. 281. in the note to part 5. § 2.

Page 199. l. 14. *Separation commencing in the reign of Edward the Third.*] Elfyngc cites instances in the 6 Edw. III. and 50 Ed. III. "After the cause of summons was ended, the Commons were willed to withdraw themselves to their antient place in the Chapter-House of the Abbot of Westminster, and there to treat and consult among themselves," p. 104. edit. of 1768, from the Author's MSS. and afterwards, p. 155.

Ibid. l. 21. *Lord Chief Justice Hale has observed.*] In his History of the Common Law, p. 14, 15.—What is said (from Lord Hale) of drawing up the acts by advice of the king's council, may be explained by a passage in Lord Clarendon's History, B. 2. Vol. 1. p. 205. folio edition. Instances enough of the *petition* and *answer* may be met with in the Cotton Collection of Records; and some in Lord Hale's History of the Pleas of the Crown.

Page 199. l. 29. *Petition and Answer.*] Complaints were made in after-times of the abuses that crept into this practice. See Glanville's Speech in Rushworth's Collect. Vol. i. p. 574.

Page 200. l. 25. *Some, by the three estates of the realm, understand the Nobility, Commons, and Clergy.*] Among those who separate the King from the three Estates, are Lord Coke, 4. Instit. 1. and Harrington's Case, 1 Ventris, 325. Bp. Stillingfleet's Ecclesiastical Cases, Vol. ii. p. 273, 384. and Dawson's Origin of Laws. Bacon on Government, and Mr. Selden in his Table Talk, p. 83.

Page 200. l. 29. *On the other hand, the better part (as I conceive) include the King as one of those estates.*] In support of this side of the question, there are many great legal authorities as well as learned writers. Such as the Roll. 2 Hen. IV. No. 32. in

the Cotton Records, p. 407. So the Record Mich. 4 Hen. viii. fol. 3. cited Atkyns's Tracts, p. 36. So Selden's Jan' Anglor. 94. notes 127. So Finch's Law, B. 2. c. 1. p. 81. To which may be added, Bp. Warburton's Alliance, p. 129.

Page 201. l. 15. *They must suppose the Clergy in Parliament to be represented by the Bishops.*] Besides what is said in the Dialogue in answer to this supposition, it is refuted in point of fact, by the circumstance of the inferior clergy themselves having been summoned, and having actually sat in Parliament, either in person or by representation, in the early reigns after the conquest. See 2 Hist. Hen. II. p. 284. 285. and see Elfyng, p. 25. &c. new edit.

Page 202. l. 6. *The Commons characterised by the various objects of representation.*] They are so characterised, for instance, by the Stat. de Tallagio non concedendo, 34 Ed. I. Stat. 4. cap. 1. Prelates, Earls, Barons, Knights, Citizens, and Burghesses.

Ibid. l. 21. *Their not being tried by Parliament or Temporal Lords.*] So is 3 Inst. p. 30 § 17. Selden Judic. of Parliament, p. 4, 5. The cases of Bp. Fisher and Archbishop Cranmer, are both instances of this kind. See the origin of this, Gilbert's Hist. Excheq. p. 40.

Page 202. l. 25. *Decline voting in capital cases from principles of the Canon Law.*] See 3 Lord Lytt. Hist. Hen. 2. p. 328 to 332. Edit. 4to.

Ibid. l. 31. *When their rights were so wickedly attacked, and they removed from the House of Lords, &c.*] This attempt, every one that wishes well to the Constitution, and in that to the Religion of his country, will be inclined to hope will never be made a second time: not but what it has its well-wishers even in these times. Mr. Hume, in his idea of a perfect commonwealth (Essays, Vol. iv.) in order to make the British Government the most perfect

perfect model of a limited monarchy, suggests, as one alteration, that the *Bishops* and Scotch Peers "ought to be removed; whose behaviour in former Parliaments destroyed entirely the authority of that House." p. 267. 3d edit. After which he adds, "that the Peers should be elective, and no Commoner should be allowed to refuse a seat offered him." *Ibid.*

Page 203. l. 10. Suppose a Bill in the upper House, which the Bishops were unanimous against, and the Temporal Lords were as strong for it, I apprehend it must pass.] What, at the time of writing the Dialogue, was advanced on mere supposition and speculative reasoning, Lord Coke, it seems, has indisputably established in point of fact and legal authority. 2 Inst. 585, &c. &c.

Ibid. l. 13. Whether the insertion of the consent of the spiritual Lords, should be continued in such case.) Whatever be the insertion, it is in its nature conclusive. Bro. Abrid. Tit' Parliament, pl. 107. But to shew in some measure, what forms have been used in the cases alluded to in the Dialogue, an instance or two may be given from one of the most interesting periods in the English history, the establishment of the Reformation.

In the Bill for the Supremacy, 1 Eliz. cap. 1. the Lords Spiritual are mentioned with the Lords Temporal in the petitionary part of the preamble: and yet it is positively said, in the history of that time, that all the Bishops present opposed it. See Camden's Annal. Edit. Hearne, p. 35. And in the enacting part of that very Law, § 2. it runs, *the authority of the present Parliament*, without mentioning particulars.

So in the Statute of Uniformity, 1 Eliz. cap. 2. § 2. it runs in general terms, *the authority of this present Parliament*: but in § 3. the style is more particular;

ticular; "Be it enacted by the Queen's Highness, " *with the assent of the Lords and Commons,*" without distinguishing the spiritual from the temporal Lords. The history of that act may be seen in Bp. Burnet's account of the Reformation, where it appears that seven Bishops, and the Abbot of Westminster, dissented from the bill. Five of them had before assisted on the Catholic side, at the conference about religion, held, by the Queen's order, in Westminster-Abbey. The Bishops, during that whole session of Parliament, were all Catholic. According to Camden there were but fourteen Bishops then living. Whether the rest were present in the House when this act passed, does not positively appear; but the contrary seems rather more probable, as the others absented on passing the Act of Supremacy above mentioned; and all in general were disgusted at the conference being held with such precipitation, without their having an opportunity of consulting the Pope. See Burn. Hist. Reform. Vol. ii. p. 394. and Camden's Annal. 35, 37.

Page 204. l. 1. *The argument of a considerable writer turns on the admission, &c.*] Alluding to Bp. Stillingfleet's Controversy with Lord Holles. Eccles. Cases, Vol. II. 373, 384.

Page 205. l. 25. *Boroughs represented by neighbours.*] This circumstance did not escape the sage Montesquieu in his reasoning on the English Constitution. "L'on connoit beaucoup mieux les be-
 "soins de sa ville, que ceux des autres villes; et
 "on juge mieux de la capacité de ses voisins, que
 "de celle de ses autres compatriotes. Il ne faut
 "donc pas que les membres du corps législatif
 "soient tirés en général du corps de la Nation;
 "mais il convient que, dans chaque lieu principal,
 " les

"les habitans se choiffent un repréfentant."

"L'Efprit des Loix, l. 11, c. 6.

Page 206. l. 6. *The writs of election.*] This appears throughout the *Brevia Parliamentaria* from the first writ remaining, viz. 49 Hen. III. See 2 Pryn. 29, 32. and feveral AQs of Parliament have been, at times, made to oblige the members for cities and boroughs to be "refiants, abiding, and free," of the faid city or borough. As 1 Hen. V. c. 1. and 23 Hen. VI. c. 15.

Page 206. l. 32. *One inftance alluded to by Mr. Locke.*] On Government, § 157.

Page 207. l. 20. *Ripigliare il Stato.*) Mach. Difcor. Sopra Livio, l. 3. dif. 1. See this recommended by Sir W. Temple, Vol. i. 258. fol. edit. Effay on Popular Difcontents; and by Lord Bolingbroke, in his Patriot King, p. 136. 8vo edit. and in his Letters on History, p. 289, Letter II. octavo edition.

Ibid. l. 33. *The prefcriptive right to fend members would continue.*) See Hobart's Rep. 15. and 2 Lord Raym. 951. in the cafe of Afhby and White. And 8th Jan. 1693. a Bill was brought in to disfranchise the Borough of Stockbridge: but was thrown out, April 19, 1699. See the Journals.

Page 208. l. 2. *Project of Cromwell's time.*) See Harris's Life of Oliver Cromwell, and other Histories. This new-modelling too (as it might have been imagined) was a neceffary ingredient in Mr. Hume's idea of a perfect Commonwealth. Effays, Vol. iv.

Page 208. l. 21. *Boroughs have petitioned againft, and abolifhed their own right of Representation.*) See Willis's Notitia Parliamentaria.

Page 210. l. 15. *Or his being accountable to his conftituents for his conduct.*) Which follows from the doctrine in the 4th Infl. 14. becaufe the particular
Representation

Representation is swallowed up in the general. But this would be repugnant, if any particular member was liable to have his conduct constitutionally reviewed and censured by the particular constituent.

Page 213. l. 20. *I did, however, state that objection.*) Above, p. 75.

Ibid. l. 33. *Laws of this and other well-policed states, have secured a landed qualification.*) For one in particular, see Plinii Epist. lib. 6. epist. 19. His expression is strong—Eisdem patrimonii tertiam partem conferre jussit in ea quæ solo continerentur: deforme arbitratus, ut erat, honorem petituros, urbem Italiamque non pro patriâ, sed pro hospitio aut stabulo quasi peregrinantes habere.

Page 214. l. 12. *It was admitted.*) Scil. p. 57.

Ibid. l. 31. *The preservation of the Constitution depends on the free action of its several parts.*) Of this, King Charles I. has given in detail a very good idea, commended and copied by Sir B. Whitlock, in his observations, Vol. ii. p. 308.

Page 215. l. 23. *From the time of the Seventh Henry.*) This is the epocha fixed by Lord Bollingbroke, in his Letters on History, p. 177. 8vo edit. Sixth Letter, second part.

Page 216. l. 6. *Hen. VII consented to some Laws made to promote the freer disposal of Estates Tail*) Our best writers generally suppose that was the real drift of the famous Statute of Fines, passed the fourth year of his reign. A modern writer, in combating the President Montesquieu's commendation of private Feudal Jurisdictions, makes a comparative observation alluding to this step taken by king Hen. VII. " Le private Giurisdizioni Feudali
 " che tanto Il nostro autore raccomanda a i Prin-
 " cipi, furono le mine, contro le quali ci volle
 " tutta la prudenza del Cardinale di Richelieu per
 " liberarne quella monarchia, donde riceverono
 " quei

“ quei Sovrani per secoli interi tanti disturbi. Nè
 “ il Regno d’ Inghilterra si sarebbe mai condotto
 “ a quella tanta felicità a cui lo vegghiamo perve-
 “ nuto, se Arrigo settimo non avesse tagliato la
 “ testa a questo orribile mostro. E mostro orribi-
 “ lissimo veramente sono dentro l’ ambito di una
 “ monarchia le particolari Giurisdizioni: Imperio
 “ in Imperio; che vale a dire che i sudditi soffro-
 “ no il Carico di un doppio imperio. Piccolo
 “ Principe massimo Tiranno.” Martinelli Lettere
 Critiche, Lett. 18ma. The same bad policy which
 this writer remarks of Feudal Jurisdictions, one of
 our greatest lawyers seems to have imputed to our
 other private subordinate jurisdictions, commonly
 called “ Liberties with *retorna brevium*:” all of
 which he wished to abolish, as being “ nothing
 “ but a foundation of Brocade and mischief; a
 “ feather in his cap that has them, but a thorn in
 “ the foot of every one that has to do with them,”
 Lord Hale’s argument in Sir Rob. Sawyer’s Case,
 1 Ventris, 412.

Page 217. l. 2. *From the dissipation of the Prince.*
 See the Conference between King Charles the Se-
 cond, and Sir William Temple, in his Memoirs,
 p. 32. 8vo edit.

Ibid. l. 29. *Lord Burleigh’s maxim.*] See Ed-
 mund Bacon on Government. And the great
 Montesquieu seems to have predicted the same end
 in other words. “ *Perira lorsque la puissance le-*
 “ *gislative sera plus corrompue que la puissance ex-*
 “ *ecutrice.*” A position, which, whatever weight
 it may have in itself, seems by no means to have
 been answered by Mr. De Lolme, c. 23. of his
 Essay. It is one thing to maintain that England
 will not perish from the same causes that made an
 end of Rome, Carthage, and Lacedæmon; be-
 cause there is no analogy between our own and
 those

those States, in their forms of Government : but it is quite another thing to apply Montesquieu's comparison. He barely says, those free Governments have perished, others will : which is only saying (and it seems is all he meant to say) that States are not immortal. He then adds, " England will see that day, when the legislative power is more corrupt than the executive : " which is deducing its dissolution from causes peculiar to itself, and arising from its own structure.

Ibid. l. 36. *Occasional intrest of Peers.*] This was an article of impeachment against Lord Oxford. See Article 16. State Trials, Vol. vi. p. 115. And see to this point, Sir W. Temp. Vol. i. p. 268. fol. edit. Essay on Popular Discontents.

Page 218. l. 29. *Incumbering the Revenue.*] See Banker's case, 5 Mod. and Lord Ch. J. Holt's argument in particular.

Page 220. l. 16. *Fortescue and Lord Hale.*] Fortesc. 36. b. Hale's Hist. Com. Law, 1. It is Aristotle's distinction of laws, 1 Rhet. c. 3. *Kata ta γραμματα* and *Kata ta ηθη*. and is adopted by the emperor. See Justin. Instit. lib. 1. tit. 2. § 3. A Greek commentator upon Sophocles has exactly the English idea in this division. *Ο νόμος εστι συνθημα γραμμεν, η συνθημα δε αγραφος νόμος.* A law is a written custom, and custom is an unwritten law. See that very fine passage in the Antigone of Sophocles, v. 459. —Not that the being written constitutes the peculiar essence of the former, or is a property incommunicable to the latter (as is explained afterwards, p. 110.) but in England, the authority of the former is deduced from writing necessarily subsisting ; in the latter, from invariable usage, whether evidenced by writing, or mere tradition.

Page 220. l. 27. *By Common Law, we mean those general Customs*] See Preface to Sir J. Davis's Reports. fol. 3, 4.

Page 221, l. 15. *Or the date of the writing corresponds with the other part of the definition.*] See Hale's Hist. Com. Law, 67.

Ibid. l. 23. *Original form.*] Hale's H. C. L. p. 23.

Ibid. l. 24. *The general matter of the Common Law.*) See Hale's H. C. L. p. 25.

Ibid. l. 33. *Christianity, as well as the Law of Nature, is part of the Common Law.*] This is laid down fully in the Case of the King and Curl, 2 Stra. 789, and recognized in a late Case of the King and Annett, M. 3 G. III. a small memorandum of which is in Dr. Burn's Ecclesiastical Law, Title "Profaneness;" it is not reported in Sir James Burrow's account of that period.

Page 222, l. 2. *Court of King's Bench styled the Custos Morum of the Kingdom.*] In the Case above cited, 2 Strange, and K. and Annett.

Page 223, l. 12. *As in the payment of a Port-duty.*] Alluding to a Case determined in B. R. Trin. 3 Geo. III. Mayor of Yarmouth and Eaton, 3 Burrows, 1402.

Ibid. l. 24. *Where Bye-Laws are without Custom, they must be reasonable and for the benefit of the Corporation.*) See Lord Raym. cited in the next note.

Page 224, l. 8. *The equality of Gavel-kind distribution before the Conquest, was the only mode of descent.*] See the Case of Clements and Scudamore, 1 Will. 63. S. C. 2 Lord Raym. 1024.

Page 225, l. 4. *The Poets speak of the Common Laws of Greece.*] See a fragment of Euripides cited, Pref. to 2 Coke.

Ibid.

Ibid. l. 12. *Punishment of one species of petit treason.*] See Cæsar, lib. 6. § 19.

Ibid. l. 18. *He has given us the outlines of Excommunication, to enforce an Ecclesiastical Jurisdiction.*) See Cæsar, lib. 6. § 13.

Ibid. l. 22. *The duty of private persons to apprehend criminals, and carry them before a magistrate.*) He confines it to matters affecting the state, lib. 6. § 20. As to the duty of private persons to apprehend any one who commits a felony in their presence, see 2 Hawk. P. C. 74. § 1. and the Authorities cited in his Margin.

Ibid. l. 27. *His declaration that Gaul copied its discipline from Britain.*] See Cæf. lib. 6. § 13.

Page 226, l. 19. *Explaining the origin of Society, as founded on compact.*) See above, § 6. and § 7.

Page 227, l. 11. *An act of Parliament is considered by Lord Hale as a kind of tripartite indenture.*) Hist. C. L. p. 2.

Page 229, l. 8. *We often meet with the very words, Rex Statuit.*) See, for instance, Stat. de Winton, 13 Ed. I. and the Prince's Case, in 8 Co.

Ibid. l. 30. *The Latw styled the Laws of the Realm.*) This has been the constant language of the King's Coronation oath. See Stat. 1. Will. Mary, c. 6. preamble, &c. and many other Acts of Parliament.

Page 230, l. 6. *Money Bill, &c.*) See, in particular, 8 & 9 Geo. 3. c. 18.

Ibid. l. 19. *Many modern acts (and all private acts) have the very language of a petition.*) See, for instance, Stat. 13 & 14, Car. II. c. 12.

Page 231, l. 21. *Sometimes, as it has been well observed.*) See Mr. Ruffhead's Preface to his edition of the Statutes, page 7, 4to.

Ibid. l. 31. *Sometimes the legislative assent is described by the general word, the Authority of Parliament.*) See 4 Inst. 2.

Ibid. l. 35. *An omission in a Recital, Lord Coke says, is fatal.* 8 Rep. 20.

Page 232, l. 1. *Parliament itself differently described in different ages.*) See 4 Inst. 2. Preface to 9 Rep. and Glanville, lib. 13, cap. 32.

Page 232, l. 22. *Magna Charta passed in a meadow.*) See its History in Mr. J. Blackstone's Introduction, and Lord Lyttleton's Hist. Hen. II. Vol. ii. p. 174.

Page 233, l. 10. *Till the reign of Hen. VII.*) See 4 Inst. 26, and 3 Inst. 41.

Ibid. l. 22. *An act in force before proclamation.*) 4 Inst. 26.

Ibid. l. 26. *Lord Holt admits.*) In the Case of the City of London and Vanacre, 1 Lord Raym. 531.

Page 234, l. 9. *The observation that all Statutes refer to the first day of the Session.*) See 4 Inst. 25.

Page 234. l. 14. *Can it mean that a Law should be in force the first day of the session, &c.*) Yet some time since the writing this Dialogue, this exposition of the rule has been given in a very strong case, which being a determination of the greatest authority, and in point against the doubt started in the Dialogue, can not with decency be unnoticed here. In the 7th of the present King, an act passed granting a duty of 6d. per pound on the exportation of all Rice, which had been imported from America duty-free, by virtue of an act made that session. The act granting the duty on exportation passed into a Law, by obtaining the royal assent the 17th June that year; some time before this act passed, a merchant exported a considerable quantity of rice, without any duty paid or demanded: on an information in the Exchequer for the duty, the court decreed against the defendant, and on appeal, the House
of

of Lords on a question put to the judges about the time of the act's commencing, and their answer, that by legal relation it commenced, from the first day of the session, the decree below was affirmed. *Panter et al' v. Attor. General*, Dom' Proc. 25 May, 1772. Nothing can be a larger exposition of the rule in the books than this case, as the Law was not actually in being, at the time of the act done, which was to be determined by that Law.

Page 234, l. 37. *And much later instances.*) See these Authorities, 2 Mod. 240. Raym. 191. Styles, 185. 5 Mod. 318. 1 Stra. 446.

Page 236, l. 18. *Which Tully so freely censures.*] In his Oration pro Domo.

Ibid. l. 31. *The Title is no part of an Act.*] See the Case of Literary Property, published in 4to, 1772, and other more antient authorities.

Page 237, l. 1. *In construction, the parts of an act may explain each other.*] Accordingly this affords a great rule of construction, 3 Co. 59, b.

Ibid. l. 5. *The preamble, we are told by Lord Coke, is a key to open the meaning.*] 4 Inst. 330, and 2 Vern. 58.

Ibid. l. 7. *Later authorities.*] 1 Peer Will. 320.

Ibid. l. 26. *So Tully has it.*] In his book de Legibus, lib. 2. c. 6. Plato, in his fourth Book de Legibus, makes his Athenian observe, that every law ought to have some preamble or introduction, (*προοίμιον*). Edit. Serran, Vol. ii. p. 723.

Ibid. l. 35. *An act of Edw. VI.*] Viz. 1 Edw. VI. c. 12, and the other alluded to, 34 Hen. VIII. c. 8.

Page 238, l. 6. *Preciso or savings.*) Sometimes reasoning is drawn from the savings of an act, as 3 Co. 87, a.

Ibid. l. 31. *In a deed, form has been the growth of time.*] See 1 Inst. 6, a. and Madox's Formulæ Anglicanæ, p. 5, p. 30.

Page 239, l. 2. *No Act of Parliament, I mean the original Roll, has any stops or paragraphs.*] See 1 Shower, 210, and 1 Will. 316. The use of punctuation and paragraphs, has been lately considered by Sir James Burrow, in an Essay on that subject.

Page 239, l. 33. *Private acts not enrolled in Chancery.*] Hob. 109.

Page 240, l. 15. *Variety of cases in our books.*] See Holland's Case, 4 Rep. 75, and many others more modern.

Page 240, l. 19. *The Statute of King James.*] Scil. 3 Jac. c. 5. See Hobart, 227.

Page 240, l. 25. *Clause in an act about Mr. Hogarth's prints.*] Scil. act 7 Geo. III. c. 38, much about the time of writing this Dialogue.

Ibid. l. 33. *The distinction introduced in the reign of Richard the Third.*] See Pref. to Mr. Cay's edition of the Statutes, and the Authority there cited.

Page 241, l. 35. *Trial by Battail.*) See Observations on Ant. Stat. 2d edit. p. 183, 267, and the case in Dyer's Reports.

Villinage.) Observ. on Ant. Stat. 246.

Wager of Law.) See Slade's Case, 4 Co. and remarks on it in Ch. Justice Vaughan's Reports.

Attaints.) See afterwards, Dialogue, p. 263.

Page 242, l. 14. *Many of the old Statutes are no other than declarations of the Common Law.*) So is 2 Inst. Show. Ca. in Parl. 64, and 1 Lord Raymond, 397, and the Prince's Case in the 8th Report.

Ibid. l. 19. *A Statute that is affirmative only, does not take away Common Law, &c.*) This great principle, that the sanction of an act is accumulative only, and not exclusive, where the remedy in the case supposed existed at Common Law, has been lately

lately recognized in the case of the King and Robinson, where an indictment for disobeying the Sessions was held good, though a particular penalty in that case was given by the act 2 Bur. 799, and in the case of the King against Pitt and Mead, where an information at Common Law for bribery at an election was held good, notwithstanding an action, with a specific penalty, was given by Statute, 3 Burrows, 1339, and since in the case of literary property, published separately, 1772, 4to. p. 25, 58.

Page 242, l. 26. *But affirmative words.*) See Hobart, 298. Show. Rep. 520, and Plowd. 206.

Ibid. l. 32. *Lord Coke asserts.*) Preface to his 2d, 3d, and 5th Reports.

Ibid. l. 33. *Lord Bacon.*) Law Tracts, p. 8.

Page 243, l. 11. *The same Author.*) Lord Coke's Pref to 3 Rep.

Ibid. l. 24. *The Common Law the basis of Construction.*) So 2 Inst. 208. Saund. 240, 1 Will. 252, and Heydon's Case, 3 Co. 7, b, and Ibid. 78. Ibid. 85, b. 5 Co. 112, b. 6 Co. 34, a.

Page 243, l. 26. *Common Law subsists where it is not expressly or virtually repeated.*) And is therefore to be preferred when they concur. 4 Co. 71.

Ibid. l. 30. *Statutes in pari Materia to be taken together in construction.*) 1 Ventris, 246, and later Authorities in Burrow's Reports.

Page 244, l. 12. *In many of our Books, and no where better than in Plowden.*) Plowden, 465, and see Co. Litt. 24, b. Reading on Stat. Uses in Bacon's Law Tracts, 334.

Ibid. l. 22. *Saying a good deal hereafter.*) See p. 174, &c.

Ibid. l. 30. *History and manners of the times.*) In which view, the *Observations on antient Statutes*, often cited already in the course of these notes, will

will always lay the curious reader under great obligations.

Page 245, l. 8. *Athenian Law punished idleness.*) See Petit Leges Atticæ, and Meursius.

Ibid. l. 13. *Athenian and Roman Law punished ingratitude.*) For the Athenian, see Petit, fol. 51, tit. 8. But it appears from the instances put by Socrates, that the Athenian Law punished only the higher instances of ingratitude, such as that to parents. Xenoph. Memorab. Socr. l. 2. § 13. Edit. Oxon.

The Roman Law punished it in various instances; as in the revocation of gifts for ingratitude. See Authorities in Wood's Imper. Institute, 172. In recalling a Freed-man into bondage, for ingratitude subsequent to his manumission. Ibid. 112, and other instances.

Ibid. l. 15. *Spartan in Plutarch.*) In the Life of Lycurgus.

Ibid. l. 27. *Formerly there were restraints of excess in apparel, &c.*) See various instances, mentioned 3 Inst. 200, 201.

Page 246, l. 4. *Geneva at present.*) Of which Mr. Keate has given a very entertaining summary.

Ibid. l. 14. *Formerly flattery and lying were punishable*) See 3 Inst. 207.

Ibid. l. 24. *When religion co-operates with Law.*] That there is in the nature of things, an alliance between religion and government in general, for the reciprocal and common benefit of both, has been shewed by several writers; no where with a more elegant and masterly precision than in the Treatise called the Alliance between Church and State. That great and important point is here however only meant to be touched on, as it arises out of the present subject the Constitution of England; and refers to what has been occasionally interspersed in the Dialogues. And, 1. The Law of this country protects the Religion of it, by so far expressly

pressly making Christianity part of its system, as to punish open violations of it. (See p. 220.)—And at the same time when it establishes a free *toleration*, as to many points of ceremony, by requiring a strict profession of its doctrines as a necessary *test* or qualification for admission into the civil offices of the state. (See p. 313.) And to this may be added, by giving no credit in judicial transactions to any assertion not verified by that solemn act of Religion called an Oath; (Dialogue 2, p. 128,) and therefore punishing the breach of oaths with such an exemplary severity, as may in that instance protect and preserve Religion itself. 2. If it be asked, In what manner Religion is subservient to Government? The answer may be in one word, by alone furnishing the true vital principle of obedience to laws themselves; without which, their restraints, with all their penalties, are mere cobwebs. It may not be amiss to add one reflection more on this subject, that the alliance above-mentioned subsists between Religion and Government “only to a certain degree;” that is, as they are subservient to one common interest; but whoever would argue from thence, that they had not each their own particular end in view, independent of each other, would on one side most clearly abolish that Religion, which, from its general principles, tends to preserve both. A sage of Greece* had long ago

* See Aristotle’s observat. in note to p. 25. Socrates had shewed before him, that without justice, in the largest sense, a man could not be perfectly obedient to Law; or that obedience to natural or divine Law was necessary to an exact conformity to human Laws. Xen. Memor. l. 4, c. 4. § 18, to which may be added the following passage from Seneca, to shew in his opinion how imperfectly Laws regulate moral conduct. “*Quam angusta innocentia est, ad legem bonum esse? quanto latius officiorum patet, quam Juris regula? Quam multa pietas, humanitas, liberalitas, justitia, fides exigunt, quæ omnia extra publicas tabulas sunt?* De Ira. lib. 2, c. 27.

determined, “*that it was not in the power of laws to make men good and just.*” It is not, indeed, the intention or end of Government, or of Laws which are made for the security of Government, to do so. For the end of Government in general, is the happiness of man, considered only as a member of society: but the end of Religion, one may venture to say, is the happiness of man throughout his whole duration.

The conclusion then from what has been said, is this—that Government protects the exercise of Religion, and guards it from open insults: that Religion, on the contrary, more materially serves society, by giving the only genuine active principle of obedience to Laws; and that too, even where the subjects of Laws are of no natural obligation, but founded on the mere exigence or convenience of society: But that Laws themselves are so very far from being a proper standard of Religion or Morality, that there are many vices materially affecting the individual, that they do not restrain; and scarce any of those virtues that constitute the peculiar excellence of the Christian Religion, that they command, or even recommend. It was thought unnecessary to give the detail that led to these conclusions; every man’s own heart, that comments impartially on his Bible, will do it sufficiently for himself.

Page 247, l. 11. *Where it is enacted, the offenders shall be punished at the king’s pleasure, means the sound discretion of his judges.*] So is 3 Inst. 146.

Ibid. l. 26. *There is indeed an implied sanction, which, though greater than any positive one, is not what such writers would mean.*] So Burlamaq. l. 1. c. 10. § 11, *Remarquez encore qui le mal qui constitue la peine, &c.* And Locke. Ess. B. 2, c. 28. § 6.

Page 248, l. 18. *Policrites has shewed.*] See the Dialogue, p. 225, and the note.

Page 248, l. 34. *Montesquieu's Reflection.*] *Esprit des Loix*. Liv. 5, c. 18.

Page 249, l. 11. *Fountain of Honour.*) Lord Bacon has given this maxim a useful turn; and at the same time he has preserved the allegory, has defined the extent of the maxim. *Ess. fol. edit.* Vol. i, p. 446, paragr. 7. See Ch. J. Holt's Argument in the Banker's Case, 5 Mod. The maxim itself, is agreeable to the theory of a celebrated politician. "Li principi debbono le cose di Carico fare amministrare ad altri e quelle di grazia a lor medefimi.

Page 250, l. 21. *Lord Hale's meaning.*) In his *Hist. C. L.* p. 66, and p. 68.

Ibid. l. 33. *The authority and use of precedents.*) See 4 Co. 93, 94. Slade's Case, and 13 Co. 14. b. Ch. J. Wray used to compare a case without a precedent to a bastard who had no cousin. 3 Co. 23, a. And whoever would overturn all use of precedents, has the usage of antient Rome to encounter, as well as the Law of England. See the passages cited from the Code, in 1. Comment. 71. And Taylor's Elements of the Civil Law.

Page 250, l. 37. *Swift's Voyage.*) 2 Vol. Edit. Hawkesworth, p. 447. —

Page 251, l. 1. *Have been attacked with more severity.*] See Bishop Stillingfleet's *Eccles. Cases*, Vol. II. p. 112.

Ibid. l. 4. *Uncertainty and contradiction of them.*) See Preface to Mr. J. Foster's Disc. on Crown Law, p. 1, 2.

Ibid. l. 5. *Has been already said.*) Above, p. 249.

Ibid. l. 15. *Told by Spelman.*) *Reliq.* p. 99, in his Treatise of the Terms.

Ibid.

Ibid. l. 24. *That Chief Justice.*) A remarkable anecdote mentioned in Burnet's Hist. of his own Times, Vol. i. p. 571.

Page 251, l. 31. *That Chancellor.*) Viz. Lord Elsemere; the whole story is in 12 Co. 74, b.

Page 251, line last. *An opinion that has crept into our books.*) See Co. Litt. § 108. 1 Inst. 81, b. and note to p. 174.

Page 252, l. 3. *That opinion is now disregarded.*) See Cro. Eliz. 770, and 2 Lord Raym. 957, and Lord Ch. J. Holt's opinion (in Ashby and White) in answer to that of J. Gould in the same case, who relied on the above opinion in 1 Inst.

Page 253, l. 22. *Good old Judge.*) Mr. J. Foster; the passage cited from his Discourses, is p. 2, 3, in the Preface.

Page 254, l. 7. *We are even told that many of Tully's are abstracts, rather than copies of what he spoke.*) Plin. Epist. lib. 1, ep. 20.

Ibid. l. 8. *Lord Bacon thought, &c.*) See the Dedication of his Argument in the case of Impeachment of Wasse, Vol. ii. fol. 100.

Page 254, l. 25. *Collected annually by persons appointed by the king.*) See Lord Coke's Prefaces, and Carter's Rep. 91.

Ibid. l. 34. *In Rymer's collection.*] 18 Rymer, p. 26.

Ibid. l. 35. *Lord Bacon.*] Law Tracts, p. 12. The passage in his Letters is, 8vo. Edit. p. 147, to the Earl of Buckingham,

Page 255, l. 9. *The general authority of Reports is derived from the Imprimatur.*] What Ch. J. Holt said upon an occasion, no book ought to be cited at the bar, but what was licensed by the Judges. (1 Lord Raym. 537,) is now, and long has been the general rule.

Page 255, l. 12. *Practice of licensing books derived from the Inquisition..*) See the ingenious Argument of the late Lord Chancellor, then Mr. York, in the case of Basket and the University of Cambridge, in Sir J. Burrow's Rep. and Burn's Ecclef. Law.

Page 256, l. 4. *Uncertainty and contradiction of Precedents.*) See Preface to Sir J. Davis's Report, fol. 9, and note to p. 251, l. 4.

Ibid. l. 32. *No case is exactly like another in all its circumstances.*) See 8 Co. 91, and 11 Co. 40. b.

Page 257, l. 28. *Lord Macclesfield used to call it removing land-marks..*) 1 Peer Will. 399, and 1 Stra. 32.

Ibid. l. 33. *It is often of little consequence how a point is determined at first, so it is but adhered to.*) This was Lord Macclesfield's favourite maxim, as is evident from the authorities just cited, and many others that follow, viz. 1 Peer Will. 399, Ibid. 452. Ibid. 549. Ibid. 747. 2 Peer Will. 2. Ibid. 99. Ibid. 213. Ibid. 259. Lord Cowper before him had been of the same way of thinking, 1 Stra. 36, and Lord King afterwards adopted the same sentiments, 2 Peer Will. 613. He even used to wish for an act of Parliament to settle certain points that had long been uncertain, ibid. 340, and actually brought one in himself to settle the right of the next of kin where the executor had a legacy (alluded to p. 180); it passed the House of Lords, but was thrown out in the lower House, 1 Stra. 569.

Page 258, l. 14. *Precedents sub silentio.*] See the Case of Q. and Bewdley, 1 Will. 223.

Ibid. l. 22. *Lord Coke's topics of legal reasoning.*) Those topics are to be found in 1 Inst. 11, the opinion of eminent lawyers he there makes his 9th topic. That deference was afterwards paid to his
argument

argument at the Bar, 1 Lord Raym. 631. And in the House of Lords, in Drury and Drury (May 26, 1762,) great weight was given by the Lords, who spoke, to the opinion of the generality of conveyancers; who had all along, in forming settlements, proceeded upon a supposition, that an infant might bar herself of dower, though the point had never been judicially determined.

Page 258, l. 29. *As has been justly said.*) In 1 Stra. 153. And see Slade's Case, 4 Co. 93, b. 94, a. Case of the general warrants, determined, since writing this Dialogue, first in Common Pleas, afterwards on error, went on this ground altogether.

Page 260, l. 16. *Trial by Jury.*) There is no trusting, in many cases, to the *etymology* of words for their own original, much less for that of the things they denote. Thus, how the assemblage of persons constituted to try facts, come to be simply called Jurors, is not so clear: as the term Juror simply means a person "sworn," and therefore a witness in a cause; or any one who takes an oath of office, might with equal propriety (if usage concurred) be called a Juror. 2. Juries are denoted by other expressions, on particular occasions, as Assize—Recognitors—Inquest—Triers: as the matter or point to be tried, are called occasionally the Issue—the Mise—the Traverse. And this observation is in general necessary, to avoid confusion in our first acquaintance with the Law language, if I may so call it. For this language, consisting of its terms of art, has (like all others) many words to denote the same thing; and the same word often stands for very different things. The reason of which in all cases is this: That such words, in both instances, stands for very complicated ideas: and therefore, though several words do in general denote the same thing, yet

(as will appear on a just analysis of the term into its primitive ideas) there is, at least, *one idea not common* to those several words. On the other hand, tho' the same word does often stand for very different things, yet there is at least *one idea that is common* to those different things; and which producing a similarity, though in a single circumstance, is the occasion of the same word being so differently applied. The same observation will shew the grounds of metaphorical or figurative language; as is finely explained by Aristotle, in his Poetics, cap. 21, and thence I conceive Mr. Locke has, in his Essay, inveighed so much against the use of figurative language in subjects that require precision: because metaphorical language would, in those cases, at best be only a pleasing delusion, by substituting pictures for realities, and proportion for identity.

Page 262, l. 28. *The practice sub silentio I was speaking of.*] Above, p. 258. The case here alluded to, is that of the Q. and corporation of Bewdley, already cited from 1 Peer Will. 223.

Page 263, l. 28. *The liberty of the Jurors.*] A practice of fining Jurors was attempted, 14 Car. II. See 2 Hale, 311. See Bushel's Case, which happened the 22 Car. II. in Vaughan's Reports.

Page 265, l. 8. *Records of the Mint.*] From which, sufficient data for calculations of this kind may be met with in Mr. Lowndes's Report to the Lords of the Treasury, containing an Essay for the Amendment of the Silver Coin, published 1695.

Ibid. l. 15. *It began in Hen. VI. time.*] Before that time, it arose from the bare freehold itself, whatever was the value. So Ch. J. Holt. 2 Lord Raym. 950.

Page 270. l. 17. *This established maxim.*] The maxim alluded to, is stronger in itself than it is put in the Dialogue—ad quæstiones facti non respondent

pondent Judices; ad quæstiones Juris non respondent Juratores. Co. Litt. 295. b.

Page 271, l. 24. *I never knew a verdict complained of, as contrary to the direction of law.*] So Vaughan, 146, 152.

Ibid. l. 34. *Littleton and his commentator.*] The passage is from Litt. § 368, in 1 Inst. 228. And see 2d Lord Raym. 1494. Foster's disc. p. 255, 257, and the King and Mayor of Liverpoole, Rep. Temp. L. Hardwick, fol. 16.

Page 272, l. 11. *The law is never submitted to them.*] So Vaughan, 143, and see the Dialogue, above.

Page 272, l. 20. *Which part of the return Ch. J. Vaughan said was insignificant, and not intelligible.*] Vaugh. 136.

Ibid. l. 26. *The Ch. Justice does there put a particular case.*] Ibid. 143, 4.

Page 273, l. 24. *Other scattered publications.*] Since the writing this Dialogue, this question has been the subject of much public as well as private debate; but no argument has as yet been urged strong enough, in the writer's humble opinion, to shake what is submitted upon the principles here advanced; and yet it is hoped it will appear he has by no means slighted, or been inattentive to the topics which he found at that time made use of on the other side the question. He believes too (as far as *his information* enables him to judge) he has made use of some topics in support of the side contended for, that have altogether escaped those, who have since agitated this question.

Page 274, l. 1. *The form of every oath.*] See 3 Inst. 165.

The oath in Crown cases is not materially different in this respect; nor does that used on the trial of prisoners allow more latitude to the Jury
in

in matters of law. In the oath for the trial of a prisoner, are the words *, " well and truly try " the prisoner at the bar, and a true deliverance " make, &c." There is some doubt about the meaning and propriety of the words, " true deliverance make." 1. They can scarcely have the common meaning of " acquitting or discharging." For it is hardly consistent with the nature of the Jury's charge, and the other words of their oath, " well and truly try:" 2. By supposing them to be synonymous to verdict, then " true deliverance make according to the evidence," will be agreeable in symmetry to the oaths used in Nisi-prius and Crown cases. But there is a difficulty in getting at this sense of the word " deliverance." It must, for this purpose, either be used, 1. Imperfectly, viz. for *deliverance of opinion*, by supplying " opinion." Or, 2. By a corruption of *deliberation*; and so mean, a true deliberation make: so that it means deliverance of the prisoner, not absolutely and at all events, but of the Jury's opinion respecting the prisoner's case: nor does the old wish of the Clerk of Arraignment to the prisoner necessarily suppose any other sense.

Page 275, l. 31. *The law not being in evidence.*] See Vaughan, 143:

Page 277, l. 11. *Lord Holt's expression.*] Somewhere in Salkeld's Report.

Ibid. l. 13. *Lord Bacon.*] In Law Tracts, p. 11.

Page 280, l. 24. *Excellently fitted to the convenience of the English government.*] So Lord Hale. 1 H. P. C. 489.

Ibid. l. 34. *All nature is disclaimed, even as a punishment, much less is it used as the means of conviction,*

* See 3 Burn. 329. Title, Sessions; and other treatises on Crown Law.

tion, as in most other countries.] The celebrated Montesquieu has, in this respect, made our government an amiable exception to all others—*nous voyons aujourd'hui une nation tres bien policée la rejeter* (Sc. la Question) *sans inconvenient*. Espr. des Loix, liv. 6, ch. 17. And almost in the same words, the present Czarina, in her Instructions for the Russian Code. *Nous voyons de nos yeux un peuple très vanté par la constitution de son état qui la rejette sans trouver que l'absence de ce moyen lui cause le moindre prejudice*. Artic. 9, par. 114, and M. Beccaria, c. 16, p. 77. And yet there is no doubt, from many unexceptionable authorities, that the rack has been used in early times. (Observations on ancient Statutes, p. 61, &c.) There is a Letter, not long since published, which shews it was even advised by a great Statesman in times of acknowledged freedom; of too great freedom, to follow such advice. But some times, and some persons in the best of times, are the last arguments to urge in proof of the Law and Constitution.

It may not be foreign to add, that the King of Prussia, who expresses such just indignation against the rack, which he had abolished in his own dominions, much misrepresents the *peine forte et dure* (to which he evidently alludes) which is inflicted on those who refuse to plead, by calling it a species of the rack. (Mem. Brand. Part III. p. 143.) The rack, wherever it is used, is used to oblige a man to confess the crime with which he is charged: the *peine forte et dure* is only to oblige him to take his trial, and not defy justice by standing mute; the one compels him, in the first instance, to say he is guilty; the other, to make him say only whether he is or is not guilty, in order to make way for the proper proof. This punishment, however, though

though an instance of it occurs within this century, has been very rarely used: not to mention that the original legality of it is questioned by the ingenious writer already cited in this note, who supposes the word *peine* was inserted by mistake in transcribing the statute of Westminster: and if no traces of this practice appear before that time, Lord Hale's assertion that it was Common Law, will have less weight; though Lord Hale allows it was doubted. See Hale's Hist. P. C. Vol. ii. p. 321, and 2 Inst. p. 179, and Observ. on ancient Stat. second edit. p. 61, &c. As however the thing itself is at length happily abolished, by an act in the eleventh of his present Majesty's reign, it would not have been necessary to have said so much, only to get rid of the misrepresentations of foreign writers.

Page 281, l. 12. *Sweden.*] See Bp. Robinson's Account of Sweden, p. 42. And for the regulations in France of this kind, see Sir W. Mildmay's Account of the Police of France, published 1748.

Ibid. line last. *The late Empress of Russia.*] See Voltaire's Histoire de l'Empire de Russie.

Page 282, l. 3. *The natives of America.*] See the Settlements. Vid. America, Vol. i, p. 176, 3d edit.

Page 283, l. 11. *Advanced by Sir W. Temple and the Bp. of Cloyne.*] See Temple on popular Discontents, Vol. i, fol. 265, 266. Bp. of Cloyne's Querist, p. 125. Q. 53, 54, 161, &c. 381, 389, published in his posthumous Works.

Page 284, l. 25. *A French philosopher.*] See une Lettre sur le Progres des Sciences, in Mons. Maupertuis's Works.

Ibid. line last. *The first trial of inoculation.*) See Dr. Mead on the Small Pox, p. 88.

Page 285, l. 16. *Lord Coke closes his History of Crimes.*) See the Epilogue to his 3d Institute.

Page 286, l. 12. *Sir Thomas More has indulged himself in many a conceit in his book.*) See his Utopia, edit. Glasg. p. 21, 37, 39, 40.

Page 287, l. 22. *Sir Tho. More.*) Ibid. p. 40.

Ibid. l. 28. *Querist.*) § 389, Post. Works, p. 161.

Page 288, l. 24. *This scheme has been offered to the legislature.*) In the year 1752. See the Journals of the House of Commons.

Ibid. l. 35. *For slander and perjury.*) 3 Inst. p. 163, 198.

Ibid. l. 36. *A cut purse.*) 1 Hale Hist. P. C. 222, and 3 Inst. 68, 206.

Page 289, l. 1. *For House-burning, the felon was burned.*] 3 Inst. 66.

Ibid. l. 9. *Partly from religious scruples.*) So Ch. J. Baron Gilbert's Rep. p. 267.

Page 291, l. 29. *On presumptive evidence.*) See an excellent tract on this subject, said by Bp. Burnet to have been written by Lord Somers.

Ibid. l. 31. *Etymology of the term.*) See Cowell in voce "Indictment."

Page 292, l. 17. *Law allows no council.*) 3 Inst. 29, 137.

Page 293, l. 14. *What the party himself, if he was master of himself?*) This Anecdote of Lord Shaftesbury, is to be met with in Mr. Walpole's Cat. Roy. and Nob. Authors, 2 vol. p. 106, second edit. An ingenious writer has (p. 155.) lately considered this subject in his *Principles of Penal Law*, c. 15.

Page 294, l. 1. *Parity of condition.*) This principle is much commended by M. Beccaria. *Ella e utilissima Legge quella, che ogni uomo sia giudicato dai suoi pari, perchè dove si tratta della libertà e della*

e della fortuna di un Cittadino, debbono tacere quei sentimenti che inspira lo difuguaglianza; e quella superiorità, con cui l'uomo fortunato guarda l' infelice, e quello sdegno, con cui l' inferiore guarda il superiore, non possono agire in questo giudizio, § 14, p. 62.

Page 294, l. 18. *Party Juries.*) The instances put, are from 3 Inst. 72, 141, and 2 Hale, 262. By some Acts of Parliament, Party-Juries are expressly excluded, as 13 & 14 Car. II. c. 11, § 11, in suits concerning the Customs.

Ibid. l. 27. *The Statute says.*) Cap. 29.

Ibid. l. 29. *Lord Coke says.*) In his Comment. 2 Inst. 49.

Ibid. l. 37. *Peers.*) The word *Peers* is applied by many of our best writers in the original large sense; for which see Dr. Johnson's admirable Dictionary under the word *Peer*, and Lord Bacon's Essay on *Ceremony*.

Page 296, l. 32. *We are to look for the commencements of these Courts at the dissolution of the Aula Regis.*) See Lord Lytt. Vol. ii, p. 227. Ch. B. Gilbert's Hist. Excheq. p. 6.

Page 297, l. 8. *Each of these courts had, at first, distinct jurisdiction.*) See the Articuli super Chartas, 2 Inst.

Ibid. l. 30. *Already in the custody of that court.*) So 3 Inst. 125.

Ibid. l. 35. *Ch. 7. Treby.*) In the Banker's Case, reported 5 Mod.

Page 298, l. 2. *In Edward III'd's time.*) Viz. 14 Ed. III. See the Observations on ancient Statutes, p. 202.

Ibid. l. 6. *Judges of this Court distinguished by the name of Barons.*) See Madox's Hist. Exchequer cap. 5.

Page 299, l. 4. *Its practice of transmitting records.*) Begun on petition, 2 Hen. IV. Rot' Parl. No. 65. 1 Danv. Abridg: 747, Cott. Rec. 411.

Ibid. l. 23. *Power vested peculiarly in him of rescinding.*] Or cancelling, as we say. Vid. Cowell. Dict. and Calvin Lexic. Jurid. voce *Cancellarius*. The favourite etymology of some of the old writers, *a cancellis*, as if that judge took his name from being seen through wooden lattices (as the lions are at the Tower) seems rather too fanciful; not but what even that confined notion may have had some foundation in fact from the form of our early courts, and of which there are still traces; and has its analogy in other law terms, as the word *Exchequer* is commonly derived with us from a chequer'd board or chess board. (Gilbert. Hist. Excheq. p. 2, and in the Antient Dialogue of the Exchequer, Mad. Hist. Appen. fol. 3.) and the cheque cloth we see is in use there at this day.—But be this as it will, the word “*Exchequer*” is a local term; that of “*Chancellor*” is a general one; and therefore calls for some origin of a much more extended application.

It should not however be omitted, that Giannone, who in his excellent work, has touched on this subject, leans very hard indeed against the etymology derived from the *exercise* of the Chancellor's power, in favour of that drawn from the nature of the *place* in which he exercised it; his reasoning being somewhat curious, the whole passage follows.—Perchè fosse chiamato Cancelliere, non è di tutti conforme il sentimento. Il Vecchio Glossario dice, che fosse così detto, perchè appartenendo a lui l'esaminare tutti i memoriali, che si danno al principe, avea potestà di segnare ciò che pareva a lui, che potesse aver camino; e di Cancellare le importune dimande, dando di penna
su i

fù i memoriali con tirar linee sopra di quelli per lungo e per traverso a guisa di cancelli. Ma questa è una molta strana etimologia, che dovette prendere il Cancelliere il suo nome *più tosto da ciò ch'egli disfa, che da quello che fa.* Meglio interpretarono Cassiodoro e Agatia, che lo derivarono a *Cancellis*; poichè dovendo questo ufficiale sopratendere alla spedizione di tutti i rescritti del Principe, sentire tutti coloro, che gli presentavano i memoriali, acciochè non fosse premuto dal popolo, ed all' incontro da tutti fosse veduto, solea stare fra Cancelli, siccome si praticava in Roma ed in Francia; ond' è che Tertulliano solea dire; *Cancellus non adoro, subsellia non contundo.*" Istoria Civile di Napoli, tom. 2, p. 200, Edit. 1762.

Page 299, l. 34. *The progress of equitable jurisdiction seems to have been in this manner.*] See the *Articuli super Chartas passim.* 2 Institute.

Page 300, l. 16. *In those days sprung feoffments to uses.*] See Lord Bacon's reading on the Statute. 1 Lord Raym. 291, and 1 Co 101, b.

Ibid. l. 22. *The common division of fraud, accident, and trust.*] See 2 Eq. Cas. abrid. p. 243, cap. 11, and the Reports there subjoined.

Page 301, l. 7. *The general ground of going into equity is the want of remedy at law.*] Lord Talbot has well explained this in the Cases of Heard v. Stamford Forresters, Cases 174. And in Morrice, Vid. Bank of England, Ibid. 222.

Ibid. l. 24. *A recovery in one action at law, will be for ever a bar to a recovery in another.*] To this there is only one exception, that of "Ejectments," which, however, is become the principal mode of trying titles to land at this day: and as it does not appear that the reason of an "*ejectment being never final,*" is any where laid down in the books, though the position is frequent, it may not be

be amiss to consider it in a few words. The reason why it is not, or can not be final, seems to be this —“ that it is impossible from the structure of the “ record in this action, to plead a former in bar of “ another ejectment brought ;” because, 1. The plaintiff and defendant are nominal, and exist in most cases on record only : and consequently may be changed in a new action. But the identity, both of plaintiff and defendant, must be averred in pleading a former action in bar. 2. The term demised may be laid many different ways. An ejectment however, though in its nature not final at *law*, is capable of being so in *equity* : and it appears from several authorities, that the court of Chancery will, on proper grounds, grant a perpetual injunction ; and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See the Cases of the E. of Bath and Sherwin, 2 Eq. Ca. Abr. and Leighton v. Leighton, 1 Will. 671, and 2 Stra. 404. It may further be observed, that as the plaintiff is not to be concluded by a single defective trial in ejectment, even though a judgment has been had consequential to the trial : so in every other case “ before a judgment is signed,” either party may have a new trial, where the first appears to the court to have been defective. And that being so very remedial a provision, (and what for a long time has been so liberally adopted in courts of law,) is a very good reason why, in every other case, a judgment once had, should be a perpetual bar to a recovery in another action on the same specific merits.

Page 302, l. 12. *A prisoner who has once had a verdict passed on him, can never have a second for the same offence.*] Nothing is so clear, as that no one shall be *tried* twice for the same offence ; but till a

verdict either of acquittal or conviction is given, no trial has been had. A remarkable instance, to illustrate this, happened at Dorchester Summer Assize, 1763: no account of which being in print, may be added here. One Gould and his wife were indicted for the murder of a parish apprentice; at the trial, before all the witnesses indorsed on the indictment had gone through their evidence, one of the jury dropped down in a fit, and was carried out of court; but not being in custody of a bailiff, the whole jury was necessarily discharged. The judges on that assize were both clearly of opinion, that the prisoners were not discharged by this accident, this being no trial at all: but as the case was uncommon, if not new, the prisoners were remanded till the next assize, in order to lay the case, in the mean time, before the twelve judges. The twelve judges were afterwards unanimously of opinion, that the accident which happened to the juror was no bar to any future trial: the prisoners were accordingly tried at the next Lent Assize, and acquitted on evidence. At the time the accident happened, and the jury were discharged, it was contended by the prisoner's counsel, that the prisoners were absolutely discharged by this event, and could not have their lives brought again into jeopardy; and Elizabeth Meadow's Case in Mr. J. Foster's Discour. p. 76, was insisted on as an authority. She was seized with pangs of labour during her trial, and was thereupon ordered back to prison, and the Jury discharged. But J. Foster said afterwards, in talking over the above case, that (though he had by accident omitted it in his printed report) her pains going off, she was afterwards tried on the same indictment that very session.

Page 303, l. 17. *But the offence is double.*] The natural grounds of the State having a right to punish a crime,

a crime, where the party injured gives up his right to satisfaction; or of the *State* having a right to pardon the crime, where the right of satisfaction remains in the party injured, is well explained by Burlamaqui, liv. I. part 2, c. 10. § 11. And see the difference between civil Satisfaction and Punishment. *Ibib.* Vol. ii. b. 3, c. 4. § 14, and M. Beccaria, c. 29, p. 139.

Page 304, l. 5. *The universal gradation of appeal.*] The right of appeal in every case, and the subordination of appeals, is finely touched on in many considerable authorities. K. and Knollys, 1 *Ld. Raym.* 15. *Dr. Bentley's Case*, 1 *Str.* 565. *Lord Derby's Case*, 1 *Peer Will.* 330. *Dr. Groenvolt's Case*, 1 *Lord Raym.* 469.

Ibid. l. 12. *Without this reservation.*] It may be observed the remedy of *appeal* was devised in the early ages of the world, and indeed seems coeval with that of the delegation of Judicature to inferior powers. It was Jethro's counsel to Moses; and Moses, himself under divine inspiration, approved of it. *Exod.* c. 18, v. 22, to the end.

Ibid. l. 30. *Writs of Certiorari from temporal courts.* So is 2 *Lord Raym.* 836.

Page 305, l. 12. *The case of College Visitors, as standing without appeal.*] See *Parkinson's Case*, *Carth.* 92. Philips and Bury in many of the Law Books, and the late *Case of St. John's College*, v. *Toddington* and the *Bp. of Ely*, in *Sir J. Burrow's 1st Vol.* and note to p. 291.

Page 306, l. 16. *There is something so noble in this last great stage of Appeal.*] The exceptions that *Sir W. Temple* says were taken to some particulars of it in his time, have been in many respects guarded against by subsequent regulations, and in general prevented by the course of education. See *Sir W. Temple's Works*, Vol. i, fol. 269. That

passage is considered by Bp. Ellys in his Tracts, on Temporal Liberty, p. 44, &c.

Page 307, l. 11. *Institution of circuits.*] The antiquity of this institution is considered in Lord Ch. J. Hale's History of the Common Law, c. 7, p. 141. And his authority relied on in the History of the reign of King Henry the Second, Vol. iii, p. 206, &c. See afterward, note to p. 309.

Page 307, l. 32. *Romans prohibited a judge, &c.*] That is the Assessor. See Wood's Imper. Institute. fol. 296. The same, it seems, is the antient law of China. Volt. Hist. Univers. Vol. xiv. p. 174.

Page 308, l. 17. *Made penal by the stat. Rich. II.*] The several Statutes here alluded to, are the 8 Rich. II. c. 2. the 33 Hen. VIII. and the 12 Geo. II.

Page 309, l. 22. *It may be difficult to say how antient this institution is.*] At the time of writing this Dialogue, it was meant to leave this point to the possible eclaircissement of the noble Historian (who had not then published the latter part) of Henry the Second, in whose reign the institution of Circuits has been commonly supposed to commence. But the records there cited from Madox, plainly prove that the institution of Justices in Eyre, which is the undoubted original of that of Circuits, is of a much higher, and indeed, as Mr. Madox concludes, of *unknown antiquity*. See Madox Hist. Excheq. c. 3. § 12, p. 84, first edition.

Page 310, l. 13. *The stat. of Westminster.*] Westminster. 2, c. 30, in 2 Inst. 423, 424.

Page 311, l. 4. *Milton.*) In his Allegro.

Ibid. l. 26. *Sir H. Spelman says.*) In his Remains, p. 49, on the antient Government of England.—To what has been touched on in the Dialogue, may be added, that the distribution of the ecclesiastical state has a great analogy to that of the civil polity, the latter being divided into counties, hundreds, tythings, hamlets, vills: the ecclesiastical

ecclesiastical into provinces, dioceses, archdeaconries, parishes. Though it may be observed, *diocese* (as its original import will sufficiently warrant) has been used in old laws for the *civil* state of England itself, as in Stat. 14, & 15. Hen. VIII. cap. 5, sect. 3, about the College of Physicians.

Page 314, l. 21. *As Tully has said.*] In his Oration pro Milone, edit. Olivet, 3.

Page 315, l. 9. *Any person may quit his native country for ever, &c.*] But it is generally agreed, can never divest himself of his native allegiance to his country; so that he must be deemed a rebel if he fights against it, not an enemy. See Calvin's Case, 7 Co. and a Letter from Sir Leoline Jenkins to Sir W. Temple upon this subject. Sir Leol. Jenk. Letters, Vol. II, p. 712.

Ibid. l. 30. *The Constitution enables the King to restrain by writ, in certain cases, from departing the kingdom.*] Lord Ch. J. Hale's Analys. 19. The law books are full enough of instances of the writ of "ne exeat regno:." In some cases it has been deemed expedient to make a particular provision by act of Parliament, as in 1721, to restrain the South-sea directors; and in 1733, to prevent the trustees of the Charitable Corporation from quitting the kingdom.

Page 316, l. 19. *Where foreign laws are the grounds of the contracts.*] See many instances in Robinson and Bland, 2 Burrows; and the case of the French Will in Shower's Cases in Parliament, and the Jewish Marriage Settlement in Dom' Proc' 1762.

Ibid. l. 33. *The case in which this point arose.*] Alluding to the case of Robinson and Bland, since reported by Sir J. Burrow, in his second Volume. At the time of writing this Dialogue, a similar instance of a much more alarming nature arose from a question on the marriage act, whether the
marriage

marriage of English subjects going into Scotland merely to evade the act, and there celebrated, was valid within that act? The apprehensions of the world on this subject have been since quieted by a solemn determination of the Court of Delegates; the Judges being clearly of opinion, that the Legislature itself, by the proviso in the act, had absolutely excepted all marriages in Scotland, and not left it in the power of construction to say what marriages were good in Scotland, and what not. This was determined at Serjeant's Inn, in the case of Copton, appellant, v. Bearcroft, respondent, Feb. 4, 1769.

Page 317, l. 3. *Will give credit to the proceedings of foreign courts, &c.*] Carthew, 32, and 2 Eq. Ca. Abrid. 475, and other authorities. And in a late Case in the House of Lords, March 4, 1771, the determination turned on the general principle of the credit *ex comitate* to be given to foreign competent jurisdictions, "the Lords declaring by "their decree, that the judgment of the supreme "Court in Jamaica ought to be received in Scotland, as evidence *prima facie* of the debt: and "that it lied on the other side to impeach the "justice of it." Sinclair, v. Frazer et Al'. See likewise many Cases in Vezey, and other late Reports.

Page 317, l. 17. *Lord Coke's doctrine on this point.*] In 3 Inst. 180.

Page 318, l. 1. *Bp. Burnet, I remember, relates his own case.*] 2 Hist. 729.

Page 318, line last. *Same as pursuing an enemy's ship into a neutral part.*] *Ipsium hostis territorium ingredi et ibi prædam agere ratio belli permittit. In medio Mari, utpote nullius territorio, id ipsum licet: in territorio utriusque amici qui hostem agit, agit et adversus Principem qui ibi imperat,*

perat, et omnem vim a quocumque factam legibus coerces, &c. says Bynkershoek, in his *Quest. Juris Publici*, b. 1, c. 8.

Page 319, l. 20. *As Tully did, speaking of Plato.*] In his 3d Book de Legibus in Præmio.

Ibid. l. 24. *All along taken for granted.*] See the note to p. 182.

Page 320, l. 25. *Lord Hale.*] In his History of the Common Law—But this has been since done with higher finishing in the last chapter of the 4th Volume of the Commentaries, not published at the time of writing the Dialogue.

Page 323, l. 18. *Atalantis.*] Meaning a fragment of Lord Bacon's under that name.

Page 324, l. 10. *Aristotle and Sallust.*] Aristotle Polit. lib. 2. § 8. p. 44. Edit. Francfort, τῆς ἀρχαίων νομοῦ λίαν ἀπλῆς εἶναι καὶ βαρβαρικῆς - - - ΕΥΘΗΘΗ δὲ παμπαν. And Sallust Bell. Catil. sect. 6, and sect. 9. Settlements in America, Vol. i, p. 181. And in China, their whole policy is founded rather on family government than positive Law, as Montesquieu, Voltaire (Vol. ii, p. 28.) and other writers observe.

Page 324, l. 24. *One reason why many Antient States were averse to Commerce.*] See an ingenious Dissertation on this subject in Dr. Taylor's Elements of the Civil Law, p. 496, and the Duc de Sully's reasoning with Hen. IV. livre 6, of his Memoires.

Page 324, l. last. *For a Fable.*] Alluding to the Fable of the Bees, which is happily rallied in the Minute Philosopher, Dial. II.

Page 325, l. 16. *Persian School of Justice.*] Alluding to Xenophon's Account of the Schools of Equity among the ancient Persians.

οἱ μὲν δὲ παῖδες εἰς τὰ διδασκαλεῖα φοιτῶντες, διαωτοὶ μανθάνοντες δικαιοσύνην καὶ λεγούσιν οἱ ἐπὶ τῷ τοῦτο ἔρχονται, ὥστε καὶ ἡμῖν οἱ τὰ γράμματα μαθησομένοι, &c. &c.

Their

Their children in the Schools pass their time in learning the principles of Justice ; and (as it is affirmed) are sent there for that particular purpose, as with us, to acquire learning. Edit. Hutch. p. 9. Cyri Inst. This admirable Institution of theirs is touched on in a paper in the Spectator, on Education, Vol. v. Numb. 337.

I can not conclude the whole better, than with that fine reflection of Tacitus on the Domestic conduct of Agricola.—*Animorum Provinciæ prudens, simulque doctus per aliena experimenta, parum profici armis, si injuriæ sequerentur, causas bellorum statuit exscindere. A se suisque orsus, primum domum suam coercuit ; quod plerisque haud minus arduum est, quam Provinciam regere.* Vit. Agric. § 19, p. 468, Edit. Gronov.

THE END.

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Ex. W. E. E.

8/24/03